

*United States Court of Appeals
for the Second Circuit*



APPENDIX

Orig w/ affidavit of mailing

76-1030

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PKS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1030

UNITED STATES OF AMERICA,

Appellee,

—against—

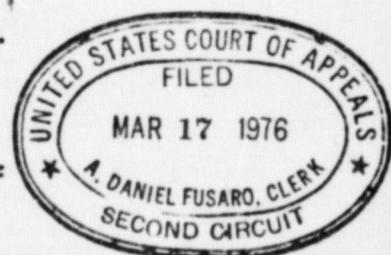
SIMON BRACH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.



INDEX

	PAGE
Transcript of Hearing Held on October 21, 1975	A 1-A 107
Decision and Order of Judge Bartels in <i>Brach v. United States</i> , 75 C 1069, dated March 9, 1976	A 10 ² -A 118

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA,

6 -against -

7 SIMON BRACH and ITSHAK BIKEL,

75 CR 403

8 Defendants

9 -----x

10 United States Courthouse
11 Brooklyn, New York

12 October 21, 1975
13 2:30 p.m. o'clock

14 B E F O R E :

15 HONORABLE JOHN R. BARTELS,

16 U. S. D. J.

17

18

19 * * *

20

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24

ILENE GINSBURG
OFFICIAL COURT REPORTER

25

1 APPEARANCES:

A 2

2
3 DAVID G. TRAGER, ESQ.
4 United States Attorney for the
Eastern District of New York

5 BY: RICHARD APPLEBY, ESQ.
6 Assistant U. S. Attorney

7 YOUTT & THAL, ESQS.
8 Attorneys for Defendant Brach

9 BY: HARRY YOUTT, ESQ.
10 Of Counsel.

11 MARION SELTZER, ESQ.
12 Attorney for Defendant Bikel.

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1 MR. APPLEBY: Government is ready, your Honor.

2 THE COURT: All right.

3 MR. APPLEBY: There are motions on the
4 calendar for this afternoon.

5 One is a motion to suppress by Mr. Brach,
6 and then there is a motion by Mr. Bikel to suppress
7 the photo identification.

8 MS. SELTZER: At this time I withdraw my
9 motion to suppress the photo identification.

10 THE COURT: You present Itshak Bikel?

11 MS. SELTZER: Itz-shak.

12 THE COURT: You are not going to be here
13 then?

14 MS. SELTZER: I am here.

15 THE COURT: Are you going to be here during
16 the suppression motion?

17 MS. SELTZER: Yes, as an observer, and I wrote
18 a letter to Mr. Appleby and sent a copy to you.

19 THE COURT: I didn't get it yet.

20 MR. APPLEBY: I received a letter --

21 THE COURT: Maybe I did. What did it say?

22 MS. SELTZER: I hadn't any motions to serve
23 up until this time because I was advised there was
24 no Bruton problem.

25 Mr. Appleby said that he would give me the

1 statement of Mr. Brach.

2 MR. APPLEBY: You will hear the statement of
3 Mr. Brach where he implicates Mr. Bikel.

4 THE COURT: Well, we will have to wait and
5 see.

6 You mean you are going to redact his oral
7 statement?

8 MR. APPLEBY: That's correct. The statement
9 will make sense even with the redaction, I think
10 you will find.

11 I have instructed the witness not to make
12 the statement in open Court.

13 THE COURT: You want to put your witness on?

14 MR. APPLEBY: I understand Mr. Youtt is going
15 to put his witnesses on the stand.

16 MR. YOUTT: If you would prefer to hear the
17 Government witnesses first, that's all right with me.

18 THE COURT: I think the Government witnesses
19 must go first.

20 MR. APPLEBY: The Government calls Gerry
21 O'Neill.

22

23 (Continued on next page.)

24

25

O'Neill - direct

5

2 G E R A L D O ' N E I L L , called as a witness,
3 having been first duly sworn by the Clerk of the
4 Court, testified as follows:

5 || DIRECT EXAMINATION

6 BY MR. APPLEBY:

7 8 Agent, by whom are you employed?

8 U. S. Customs Service

Q. How many years have you been so employed?

10 A Seven years

11 Q And can you briefly describe to Judge Bartels
12 what your duties encompass?

13 A For the past couple of years, basically in-
14 vestigating cargo theft and hijacking from the pier area,
15 and from JFK Airport.

16 Q Are you the case agent in charge of the case,
17 United States v. Itshak Biket and Simon Brach?

18 A Yes.

19 Q Did you have occasion to arrest the defendant
20 Simon Brach?

21 A Yes.

22 || Q Do you recall what date that was?

23 A Yes, it was April 20th of this year.

24 Q Could it have been April 21st?

25 A Yes, it could have been the 21st.

Q Where did the arrest occurred?

3 A Brooklyn Federal Court -- not the Federal
4 Court -- Supreme Court.

Q. What was Mr. Brach doing in the Supreme Court?

6 A He was about to be arraigned on an offense
7 allegedly involving a bad check.

8 Q Prior to your seeing Mr. Brach in the Brooklyn
9 Supreme Court, did you have a warrant for his arrest?

16 A Yes.

Q Was that issued by the --

THE COURT: Ms. Seltzer, is your client here?

MS. SELTZER: Yes, your Honor.

THE COURT: I don't see him -- oh, he's here.

15 Q Prior to your meeting Mr. Brach at the
16 Brooklyn Supreme Court, did you have an arrest warrant in
your possession for Mr. Brach's arrest?

A Yes.

19 Q That was issued by the U. S. Magistrate Max Schiffman?

A Correct.

22 Q Did you place Mr. Brach under arrest at the Brooklyn Supreme Court after his arraignment?

A Yes.

25 Q Where did you take him after you placed him
under arrest?

1 O'Neill - direct

2 A He was taken to our office, 6 World Trade
3 Center in Manhattan.

4 Q Approximately what time was that?

5 A He was arrested after lunch. About 1:00 --
6 we probably arrived at my office 1:00, 1:30

7 Q Could you tell Judge Bartels what occurred
8 at your office in the World Trade Center with respect to
9 the defendant Brach?

10 A Yes.

11 First he was photographed and booked, finger-
12 printed. Then he was escorted up to my office on the fifth
13 floor.

14 He had been advised of his rights at the time
15 he was arrested.

16 THE COURT: He was advised of his rights?

17 THE WITNESS: He was advised of his rights
18 at the time of arrest in Brooklyn.

19 After he was booked in my office, I re-advised
20 him of his rights.

21 THE COURT: Let me understand this.

22 You had a warrant for the arrest which you
23 accomplished in the Brooklyn Supreme Court.

24 Did you advise him of his rights right then
25 and there?

1 O'Neill - direct

2 THE WITNESS: Right then and there.

3 THE COURT: Was that inside the Courthouse?

4 THE WITNESS: To be completely exact, it was
5 in the car. We had a car waiting in front of the
6 Courthouse.

7 THE COURT: I see. That's right across the
8 street here, the State Supreme Court.

9 THE WITNESS: Yes.

10 THE COURT: Then you took him to 6 World Trade
11 Center and you had him photographed, fingerprinted,
12 and then you advised him of his rights again;
13 right?

14 THE WITNESS: Yes, sir.

15 BY MR. APPLEBY:

16 Q Incidentally, Agent, when you advised him of
17 his rights near the Brooklyn Supreme Court, were you reading
18 from anything or did you do it from memory?

19 A I always read from a card.

20 THE COURT: That doesn't exactly answer the
21 question.

22 You were reading both times from the card?

23 THE WITNESS: Yes.

24 Q Could you produce that card, please, Agent?

25 A I hope so.

2 MR. APPLEBY: I ask this advice of rights
3 form be marked as Government Exhibit 1 at the hearing.

4 THE CLERK: Government Exhibit 1, hearing
5 Exhibit 1, advice of rights card.

6 (So marked.)

7 MR. APPLEBY: I would ask it be moved into
8 evidence.

9 MR. YOUTT: No objection.

10 THE CLERK: Marked in evidence.

11 (So marked.)

12 MR. APPLEBY: With your permission, your
13 Honor, I am going to dispense with Agent O'Neill
14 reading the entire card.

15 THE COURT: Let me see the card.

16 (Handing.)

17 (Pause.)

18 THE COURT: All right.

19 Well, did you ask him whether he understood
20 his rights?

21 THE WITNESS: Yes, I did.

22 THE COURT: What did he say?

23 THE WITNESS: He said he understood his rights.

24 THE COURT: Both times?

25 THE WITNESS: Yes.

2 BY MR. APPLEBY:

3 Q After you advised him of his rights and he
4 said he understood them, did you question the defendant in
5 your office?

6 A Initially we filled out a standard form.

7 I asked the defendant for his date of birth
8 and Social Security number, pedigree information.9 After completing that, I asked if he was
10 willing to make a statement of any kind.

11 THE COURT: Did you ask him to sign anything?

12 THE WITNESS: I don't believe so.

13 Q Continue, please.

14 A I asked if he'd been willing to make a
15 statement.

16 I will try to recount it exactly as it occurred.

17 He indicated to me that he was willing to
18 make a statement but initially did not specify anything.
19 We were talking in generalities. I explained I thought
20 we had a good case against him without going into details
21 per se but reflected somewhat on the case as I understood it.22 He seemed to be receptive to my suggestion
23 that it was a good case.24 Midway through the interview, he made a
25 statement. The interview was conducted, by the way, with

1 O'Neill - direct

11

2 one of the agents I work with, Edward Adamson.

3 THE COURT: You were there?

4 THE WITNESS: Yes, I was doing the interview-
5 ing.6 THE COURT: It was done through Edward
7 Adamson?8 THE WITNESS: During the entire interview,
9 Ed Adamson was with me.

10 THE COURT: He didn't conduct the interview?

11 THE WITNESS: No, he didn't, no.

12 Mr. Brach said to me in effect, "The load
13 is in tact. It's still around."

14 I took it to be a form of admission.

15 I immediately called Mr. Appleby and advised
16 him -- let me interrupt -- Mr. Brach said to me,
17 after he made this admission of sorts, that he
18 wished to speak with a United States attorney.

19 THE COURT: He said that?

20 THE WITNESS: It was his suggestion.

21 BY MR. APPLBY:

22 Q Did he specify a particular United States
23 attorney?24 A I don't believe so. But I saw no possible
25 reason not to grant his request and I telephoned Mr. Appleby.

1 A 12 12
2 O'Neill - direct

3 We then terminated the interview, drove over
4 to this building, arriving here about 3:00.

5 At this point I was escorted now by Peter
6 Reilly.

7 THE COURT: Who is he?

8 THE WITNESS: He is sitting at the prosecu-
9 tor's desk.

10 THE COURT: But who is he?

11 THE WITNESS: He is a special agent with
12 the United States Customs Service.

13 BY MR. APPLEBY:

14 Q Approximately how long did the entire process-
15 ing and fingerprinting and questioning of Mr. Brach take at
16 the World Trade Center?

17 A I don't think it took too much more than an
18 hour.

19 Q You arrived at the U. S. attorney's office
20 approximately 3:00 p.m.?

21 A Approximately.

22 Q There came a time when Mr. Brach was escorted
23 to my office?

24 A That's correct.

25 Q Tell Judge Bartels what occurred after Mr. Brach
arrived in my office?

A I believe you read him his rights again.

3 We -- Mr. Brach asked you, as best I can remember --

Q Did Mr. Brach say he understood his rights?

5 A Yes. It was difficult reading his rights.

6 He kept saying, "I understand," "I understand," "I understand,"
7 but as a matter of policy, we read the rights and request
8 they state whether or not they understand the rights,
9 which he did.

10 Q Could you briefly describe Mr. Brach's
11 mood at this time, his actions?

12 A Very cooperative, basically, almost light-
13 hearted and giddy.

14 At one point in my office, he had become
15 rather serious for a brief interlude but for the most part
16 he was extremely cooperative and in amazingly good spirits,
17 I thought.

Q Continue with what occurred in my office.

19 A He asked if he could speak with Mr. Puccio,
20 who was your supervisor -- I forgot Mr. Puccio's title --
21 and apparently you went and spoke with Mr. Puccio and came
22 back and stated something to the effect, if he wanted to
23 make a statement, it would be to you and myself and Mr. Reilly
24 that the statement would be made and was he willing to make
25 a statement.

O'Neill - direct

He asked -- said something to the effect,
"Well, what's in it for me? Can I get immunity on this,"
at which point he was immediately told, "No." You rather
emphatically told him, "No."

8 Q Was there anything stated with respect to his
9 cooperation in terms of what sentence he may receive?

10 A Please repeat?

11 Q Was there anything stated with respect to
12 what would be brought to the attention of the sentencing
13 judge if he was sentenced?

14 A Yes.

15 Mr. Appleby told Mr. Brach that should he
16 make a statement and cooperate, any and all cooperation
17 would be brought to the judge's attention that would be
18 hearing the case.

19 Q Would you continue, please?

20 A Apparently Mr. Brach found that to be a
21 suitable arrangement and he advised that he would make a
22 statement relevant to the incident that occurred on March 5,
23 1975, which is the date of the theft which had occurred.

24 Q Could you tell us what Mr. Brach's statement
25 was?

O'Neill - direct A 15 15

A Yes.

He stated that on the morning of March the 5th, he, together with an individual, Itshak Bikel, were driving along the Brooklyn-Queens Expressway heading toward the Williamsburgh section of Brooklyn, when he, Brach, saw a Fried Trading truck directly in front of them, apparently running from the pier area.

THE COURT: What kind of truck?

THE WITNESS: Fried -- F-r-i-e-d-

THE COURT: That's the name of the owner?

THE WITNESS: Yes, Fried Trading truck.

THE COURT: Is that in relative?

THE WITNESS: Yes.

THE COURT: Fried?

MR. APPLEBY: He's the stepson of Itshak Fried, one of the owners of the Fried Trading Company.

THE COURT: What happened?

THE WITNESS: Brach had stated prior to that that he's been an employee of Fried Trading; he'd been a driver.

He recognized the truck because of the fact that he was previously employed with the company.

He stated they followed the truck to the Fried office at Clymer Street, 167 C-l-y-m-b-e-r Street.

He stated in effect that as they were following

1 O'Neill - direct

16

2 the truck, he had stated to Bikel that he planned
3 on stealing the truck.

4 He had also stated to us that prior to
5 March 5th, I believe it was March the 3rd, he had
6 gone to the Fried Trading office at 160 Clymer
7 Street. He spoke with his step-brother Nachman Brach
8 or Nachman Fried, and asked for a loan and the loan
9 was refused, and apparently harsh words were ex-
10 changed and he left mad, made a threat of sorts --
11 I believe he stated to the effect that -- "I will get
12 you."

13 He said that upon arriving at the office,
14 he saw the driver exit the truck.

15 The truck, by the way, I think it is a 20-
16 foot truck --

17 BY MR. APPLEBY:

18 Q Just tell us what Mr. Brach said.

19 A The driver left the truck, went into the
20 Fried's office. Brach stated that he went over to the
21 truck and that he had in his possession one or more keys
22 for either one or more vehicles that Fried Trading Company
23 owns.

24 He said he had the keys because of the fact
25 that he had been a driver and for some reason, he had

these keys in his possession.

He stated that he found a key that opened
4 the truck. He opened the door to the truck, put it in
5 reverse. The truck was parked in front of the company. It
6 wasn't in the garage. Apparently the garage was blocked
7 or for whatever reason, the driver had not effected the
8 delivery into the actual premises.

22 He had previously told Bikel, prior to the
23 time he took the truck, that he was going to take the
24 truck and he asked Bikel to assist him in the theft and
25 apparently -- Brach said Bikel replied in the affirmative;

1
2 That when he entered the truck, he told Bikel to follow
3 him in his car -- Brach drives a '63 blue Plymouth, I
4 think -- and Bikel's job was to follow the truck where he
5 went -- Brach -- to.

6 I believe it was the Do-Re-Mi Knit Corpora-
7 tion on Kent Avenue.

8 Brach decided to contact Vincent Mancini
9 and advised he knew him for several years.

10 Q Could that be Louis Mancini?

11 A Yes, Louis Mancini.

12 By this time he opened the truck and saw the
13 contents were eight-track stereo units to be used in an
14 automobile.

15 He called Mancini up and advised him that
16 he had a full load of Mecca, M-e-c-c-a stereo audio units.

17 Q Do you know the value of the units?

18 Mr. Brach didn't state this but do you know
19 the value?

20 A No -- well, I am told the retail value of
21 each unit is slightly in excess of a hundred dollars.

22 There were about a thousand, so it was ap-
23 proximately \$100,000. He didn't tell me that.

24 THE COURT: These are for a car?

25 THE WITNESS: Yes.

O'Neill - direct

A 19

19

BY MR. APPLEBY:

Q Continue.

A He called Louis Mancini and advised him he had in his possession a load of units and wanted to sell them.

He stated Mancini expressed immediate interest in buying the units and asked for directions where to go and said he would get there as quickly as he could get there.

He said that he then asked Biket to go rent a truck because there was going to be -- this is a big truck, 20-foot truck, and he need a truck to cart the merchandise away.

He said that Bikel took off in his car, this Plymouth I earlier referred to.

THE COURT: Well, did he say that Bikell had told him?

THE WITNESS: Yes. I will go back and make sure I haven't missed anything.

Yes. He had directed Bikel to follow him and Bikel did follow him to this address at Kent Avenue.

He telephoned, found that he had a buyer, then asked Biket to rent a truck so they could cart

1 O'Neill - direct
2 the stolen merchandise away.

3 He stated that approximately an hour later,
4 this Louis Mancini arrived at the Kent Avenue ad-
5 dress and was driving a green panel truck and said
6 that Mancini had one male individual with him who
7 he knew only as "Junior" and he believed Junior
8 was Mancini's son.

9 BY MR. APPLEBY:

10 Q Do you know who Junior is?

11 A Yes. That is Angelo Rosario.

12 Q Continue, please.

13 A He stated they proceeded to unload from
14 the Fried Truck into this green van the contents; that
15 some time thereafter, Bikel arrived at the location and
16 Bikel was driving a U-Haul truck and I believe this was
17 a 20-foot truck as well.

18 He stated that himself, Bikel, Mancini and
19 Junior -- Angelo Rosario, succeeded in unloading all of
20 the merchandise from the Fried truck into both the van
21 and into the rented U-Haul; that --

22 THE COURT: You mean the U-Haul didn't --
23 why did he put it in two trucks?

24 THE WITNESS: The van is a small van. There
25 wasn't enough room.

THE COURT: They had to have two things?

THE WITNESS: Perhaps there was enough room
U-Haul to put the entire load in. I don't
nor do I believe I inquired into that.

But the fact is that Brach stated that both of the trucks were loaded and that Mancini drove off in the green van and that Junior or Angelo Rosario drove off in the U-Haul.

He stated that he had been given a partial payment at this time by Mancini -- in Mr. Appleby's office.

This wasn't an in-depth interview. It was rather speedy and he stated something to the effect as to the amount of money that Mancini had offered to pay him for this load, and I think he said \$20,000, but I am not sure.

He did state, however, that a payment of some sort had been made on the spot at this time and that after payment had been made and after the trucks had been loaded, the trucks were driven off by Mancini in the van and by Rosario driving the Grailaul.

THE COURT: Bikel took no part in that?

THE WITNESS: Not in the driving.

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1 O'Neill - direct

22

2 Bikel, after he arrived back at the yard,
3 assisted in the unloading of the merchandise from
4 the Fried truck into the U-Haul truck.

5 THE COURT: Then, as I understand it, Brach
6 and Bikel just remained at Kent Avenue; is that
7 right?

8 THE WITNESS: I don't recall that we con-
9 tinued the interview in this direction as to what
10 their activities were for the rest of the day.

11 I think we went on to another area of the
12 investigation from here; is that correct?

13 BY MR APPLEGAY:

14 Q Why don't you finish the statement and then
15 we will tell Judge Bartels what happened after you tell us about
16 these individuals.

17 A Brach stated approximately -- well, as a
18 matter of fact, he said specifically -- well, I believe
19 it was April the 15th -- I don't know why he would have
20 remembered the date or how he arrived at that date --
21 but he stated on April 15th, he had driven out to Carteret
22 New Jersey, where Mancini lives -- 8 George Court, in
23 Carteret -- and he wanted some more money.

24 He said he was met at the house by Al Greco,
25 who he believes is Mancini's son-in-law; that Al Greco

1 advised him that Mancini wasn't at home; that he was in
2 Florida but that he, meaning Greco, could get some money
3 for Brach.

4
5 He stated that Greco telephoned somebody
6 named John; that Greco advised him that he should fol-
7 low Greco and he did.

8
9 He said they drove from the residence in
10 Carteret, south into New Jersey, for about 40 minutes;
11 that they arrived at a private house, entered the private
12 house. He was introduced to John -- no last name; that
13 John, after speaking briefly with Al Greco, gave Greco
14 \$500 and Greco immediately gave the \$500 to Brach in
15 John's presence.

16
17 This John was later identified as John
18 Paperwik.

19
20 Then he also said, at this time Greco asked
21 Mr. Paperwik if he could have any more of the radios and
22 Paperwik answered to the effect that it was still light
23 out.

24
25 He didn't want to go to the truck while it
was still light.

26
27 THE COURT: Greco asked Paperwik or vice versa?

28
29 THE WITNESS: Greco asked Paperwik.

30
31 THE COURT: Well, how did Paperwik get these

1 O'Neill - direct

2 stereos?

3 THE WITNESS: I will try to get to that,
4 your Honor. I will go back a little bit.

5 When Brach and Grecco arrived at this house
6 in Marlboro Township, it was later learned, Brach saw a
7 large truck parked in front of the house Paperwik lived in.

8 THE COURT: But he didn't know anything
9 about Paperwik before that?

10 THE WITNESS: He didn't know who he was.
11 He was just going to get some money.

12 Greco said if he follows him, he'll get
13 some money.

14 They arrive at the house. He was introduced
15 to John. John gave \$500 to Geco and Greco gave it
16 to Simon.

17 Then Mr. Brach testified that Greco asked
18 for more radios. Paperwik said, "No, wait until
19 it gets dark."

20 Mr. Brach took this to mean that the truck
21 in front of the house, no more than 20 feet from
22 the front entrance, was the truck John was referring
23 to and that the automobile stero units were in
24 the truck.

25 THE COURT: Well, there is sort of a hiatus

2 where.

3 THE WITNESS: If you say so.

4 THE COURT: Well, we find that Brach comes
5 to Carteret to see Mancini.6 Well, after that he also sees a truck, a big
7 truck parked in front of someone's house who finally
8 is discovered to be Paperwik; right?

9 MR. APPLEBY: That's correct.

10 THE COURT: Greco says he'll have to talk to
11 John to get \$500. John gives Greco \$500 which in
12 turn is turned over to Brach. But we never find
13 out how the stereos get into Paperwik's truck.

14 There is sort of a hiatus there, isn't there?

15 MR. APPLEBY: Correct.

16 THE WITNESS: This is what Brach told us.

17 THE COURT: Did he tell you anything further?

18 THE WITNESS: Well, I will continue.

19 THE COURT: We will go ahead inspite of the
20 hiatus.

21 BY MR. APPLEBY:

22 Q After Mr. Brach provided us with this
23 information, what did I do?

24 A You probably asked where --

25 THE COURT: No. Do you remember what he

1 O'Neill - direct

2 did or don't you?

3 THE WITNESS: No, I don't know what you are
4 referring to, Mr. Appleby.

5 BY MR. APPLEBY:

6 Q Was anything done with respect to warrants?

7 A Yes.

8 Q Could you tell us, please?

9 A Yes. You initiated the proceedings to get
10 arrest warrants for four individuals.11 Q And did I write out the arrest warrants
12 right in front of Mr. Brach?

13 A We prepared a complaint.

14 Q How was this complaint prepared?

15 A It was prepared basically by questioning
16 Mr. Brach.17 Q And I was writing the statement as Mr. Brach
18 was telling me the details?19 A We were preparing the complaint based on
20 the details being given to us by Mr. Brach.

21 Q Approximately what time is this, now?

22 A Approximately 4:00 to 4:45.

23 Q Now, were any arrangements made with
24 Mr. Brach and the agents to find this load of stereos?

25 A Yes, there were.

1 O'Neill - direct

2 Q Tell us what happened?

3 A Well, Mr. Brach volunteered the fact that
4 he could find the house he had been to on April 15th,
5 where the truck was parked and where he was certain that
6 "X" number of the stolen units were in tact.

7 Q Continue, please.

8 A I called up some agents that were working
9 the case with us from my office. We decided that myself
10 and Mr. Reilly and Mr. Brach would attempt to find the
11 house referred to --

12 THE COURT: This is in Carteret?

13 THE WITNESS: No. There is two residences,
14 the Carteret residence is where he went to see
15 Mr. Mancini.16 THE COURT: What house are you looking for,
17 now?18 THE WITNESS: The one in South New Jersey.
19 We didn't know where it was.20 THE COURT: What was supposed to be there,
21 a truck?22 THE WITNESS: Mr. Brach was under the impres-
23 sion that what he had seen on the 15th would be
24 there, and hopefully there would be a very large
25 percentage of the radios in that truck.

1 O'Neill - direct

2 We were trying to make a recovery.

3 THE COURT: We skipped over Mancini's place
4 in Carteret and now we're in south Jersey where
5 Mr. Brach thinks the truck will be.6 THE WITNESS: Yes. He doesn't know where
7 it is. He thinks if we go down there we can find
8 it by memory.9 He couldn't describe it or name it. He
10 was certain if we all went to south Jersey, we
11 could find the place where he received the \$500.12 THE COURT: I thought he received the \$500
13 in Carteret.14 THE WITNESS: No. He went to Carteret and
15 then followed Mr. Greco about 40 or 45 minutes to
16 south Jersey.17 THE COURT: You didn't say that after the
18 Carteret affair, Mr. Greco took him to a house in
19 south Jersey.20 THE WITNESS: I thought I had. If not, I
21 will repeat it.22 He followed Mr. Greco to a place approximately
23 40 minutes south and it was in this house that he
24 saw the house he thought the radios would be in.

25

1 O'Neill - direct

2 BY MR. APPLEBY:

3 Q So he knew where Mancini' resided but not
4 where the cab was and where he presumed the stereos to be?

5 A Right.

6 Q Then you made arrangements with fellow
7 agents to take Mr. Brach down to south Jersey to look for
8 the units?

9 A Yes.

10 Q Were any arrangements made at that point
11 with respect to Mr. Brach's arraignment?12 A Yes. Normally an arraignment would transpire
13 at this point. We decided the time factor would be such
14 that it wouldn't be feasible.15 Q When you say, "The time factor wouldn't be
16 such," are you talking about the goods?17 A Well, we were all entered in establishing
18 the location of the residence and were hoping to get the
19 ball on the road and get started.20 Mr. Brach knew he was going to be arraigned
21 either then or at a future date and volunteered that
22 it was necessary to be arraigned and inquired if it could
23 be had at another time.24 Q Were documents prepared with respect to
25 Mr. Brach's arraignment?

1 O'Neill - direct

30

2 A You prepared a document relative to Mr. Brach,
3 relevant to a postponement of and an arraignment.4 MR. APPLEBY: I request this document be
5 marked as Government Exhibit 2 for the hearing.6 THE CLERK: Document dated April 21, 1975,
7 marked for the hearing as Government Exhibit 2.

8 (So marked.)

9 MR. APPLEBY: I previously supplied
10 Mr. Youtt and Mr. Thal with a copy of this state-
11 ment.

12 BY MR. APPLEBY:

13 Q I show you Government Exhibit 2, Agent O'Neill,
14 and ask you if you can identify it.15 A Yes. This is the document that was prepared
16 in your office, Mr. Appleby's office, on the 21st.17 It says: At 3:00 p.m., where he waived his
18 right to a speedy arraignment.19 Q Don't tell us what it says. That's the docu-
20 ment?

21 A That Mr. Brach signed.

22 Q Does it indicate what time he signed it?

23 A Yes, 4:58 p.m.

24 Q Does it indicate when he was brought into
25 my office?

A 31

31

1 O'Neill - direct

2 A 3:30 p.m.

3 THE COURT: What the date?

4 MR. APPLEBY: April 21st.

5 Would you like me to read it?

6 "I, Simon Brach, am aware that I have a
7 right to be brought before a U. S. Magistrate
8 immediately after my arrest today, April 21, 1975,
9 at 3:30 p.m. However, I waive my right to a speedy
10 arraignment and agree to be arraigned tomorrow,
11 April 22, 1975, so that I may assist representatives
12 of the United States Government in locating goods
13 which I have previously stolen and sold to several
14 individuals who, in turn, transported the goods
15 to New Jersey.

16 "I have previously been read my Miranda
17 warnings by Richard Appleby, Assistant U. S.
18 Attorney, in his office in the presence of Gerald
19 O'Neill and Peter Reilly, U. S. Customs agents,"
20 and it is signed and witnessed by Brach, myself,
21 Gerry O'Neill, Pete Reilly signed, "Simon Brach,"
22 and the time is recorded as 4:58 p.m.

23 BY MR. APPLEBY:

24 Q After Mr. Brach signed the document, tell us
25 what transpired thereafter.

2 A Yes. I asked that several agents go over
3 to the vicinity of Carteret, New Jersey -- oh, after the
4 arrest warrants had been prepared and given to me, this
5 was after --

6 Q There was a period of time when arrest
7 warrants were prepared for these four individuals; correct?

8 A Yes, sir.

9 Q And there was a time I went down to the
10 Magistrate's office to procure these warrants?

11 A Correct.

12 Q And then I procured them and gave them to
13 you and fellow agents of the Customs Service?

14 A Correct.

15 Q Then what occurred?

16 A Several of the agents were instructed to go
17 down to Carteret but not to take action or serve the
18 warrants until hearing from us.

19 We, in turn -- specifically, Reilly, myself
20 and Mr. Brach, in my car, drove down to the vicinity of
21 Marlboro Township in New Jersey.

22 We were being guided specifically by Brach.
23 We didn't know where we were going other than his direc-
24 tions.

25 We arrived in a remote area. It was dark by

1 now and completely on Mr. Brach's advice, we proceeded
2 to drive up and down specific roadways and highways hoping
3 that he would be able to remember the area that he had
4 been in the preceding week.

5 We spent several hours trying to locate
6 that particular house with negative results.

7 It was dark, it was difficult, practically
8 impossible, and we gave up later in the evening.

9 We contacted the agents who were up in
10 Carteret and advised them no action was to be taken in
11 serving these arrest warrants that evening.

12 They went home. We in turn proceeded back
13 to Manhattan and we dropped Mr. Brach off at the West
14 Street Federal Penitentiary for the evening.

15 Q Approximately what time was that?

16 A I would say it was late. We spent hours
17 and hours looking for the house.

18 I would say it was 11:00. It could have been
19 later. It was late in the evening.

20 Q Tell us what happened the next day, please.

21 A Yes.

22 Q Go ahead.

23 A We picked Mr. Brach up. I guess it was the
24 late morning. I was with another agent at this time,

James Healy.

3 Healy, Simon and myself again proceeded
4 south into New Jersey to that area I keep referring to,
5 Marlboro, because that's the only town I recall offhand
6 where we were near and subsequently the truck was found.

7 We spent several hours driving around, as
8 the previous evening, looking for something that would
9 spark -- something Mr. Brach would remember that he
10 had seen.

11 At about 2:00 o'clock in the afternoon, he
12 recalled something and that this was the place he had
13 been the preceding week. We passed a house with a big
14 truck and he stated that he was emphatically certain this
15 was the house.

16 Q Now, do you know what I did with respect
17 to procuring a search warrant for that truck?

18 A I basically remember what you did.

19 I remember we couldn't take very many steps
20 in obtaining one until we found the house and at this
21 point it was somewhat uncertain if we were ever going to
22 find it.

Upon seeing it was definitely the house and
truck Mr. Brach had reason to believe the stolen merchandise
was in, I telephoned you, got as good a description as

1 O'Neill - direct

2 we could --

3 THE COURT: Where was this house?

4 THE WITNESS: Marlboro Township. I don't
5 remember the exact address.

6 THE COURT: All right.

7 Q Would you continue with what happened with
8 respect to the search warrant?

9 A Yes. I telephoned you, advised you of what
10 we had located. You in turn had been in touch either
11 at my direction or as a matter of mutual convenience
12 Mr. Reilly, who was either at your office or proceeded
13 to your office.

14 Q Did Mr. Reilly pick up a draft of a search
15 warrant from me?

16 A Yes, he did.

17 THE COURT: Who is Reilly?

18 THE WITNESS: The other customs agent.

19 MR. APPLEBY: He is here in Court, your
20 Honor.

21 THE COURT: What did Reilly do?

22 THE WITNESS: He picked up from Mr. Appleby
23 a rough draft, as I understand it, of the search
24 warrant Mr. Appleby was preparing on my directions
25 from the scene in New Jersey, and then Reilly went

1 O'Neill - direct 36
2 over to the Federal Court in Newark and together
3 with an attorney over there and a magistrate,
4 prepared a search warrant.

5 BY MR. APPLEBY:

6 Q Then what was done with the search warrant?

7 A That in turn was given to another one of
8 the agents that was working on this case with me, James
9 C-o-b-1-e.

10 Coble went up -- he had driven from the
11 residence in Marlboro Township, New Jersey, to the
12 Federal Court in Newark and by the time he arrived there,
13 the magistrate had succeeded in drawing up the search
14 warrant for the truck that we were seeking the warrant --

15 THE COURT: We need all those kinds of de-
16 tails?

17 The fact that a magistrate issued a warrant --

18 THE WITNESS: He issued the warrant. Coble
19 knew where the house was, drove down to New Jersey
20 and gave me the warrant.

21 Q Did you serve the warrant?

22 A Yes. The search warrant and the arrest
23 warrant.

24 Q Were the individuals arrested that day?

25 A Well, Mr. Paperwik was arrested at his

1 O'Neill - direct

37

2 residence in Marlboro. I asked him if he had any Mecca
3 stereo units in the truck.4 THE COURT: Aren't we getting away from the
5 suppression?6 Q There came a time when the four individuals
7 were arrested, the search warrant executed?

8 A Yes.

9 Q And a seizure made as a result of that search
10 warrant; correct?

11 A Yes.

12 Q Now, when you were down in New Jersey or
13 wherever you were the next time, did there come a time
14 when Mr. Brach executed another waiver?

15 A Yes.

16 MR. APPLEBY: Would you please mark this?

17 THE CLERK: Government Exhibit 3 for the
18 hearing, document dated 4/22/75.

19 (So marked.)

20 MR. APPLEBY: Your Honor, I previously
21 provided a copy of this to defense counsel.22 Q Agent O'Neill, I show you Government 3. Do
23 you recognize that document?

24 A Yes.

25 Q Tell us what it is.

1 O'Neill - direct 38
2 A This is a waiver signed by Mr. Brach on
3 April 22nd, waiving his right for an arraignment on that
4 day.

5 Q When was that statement made or signed by
6 Mr. Brach?

7 A On April 22nd at 3:20, it says.

8 THE COURT: That's the next day.

9 MR. APPLEBY: That's correct.

10 The first day they weren't able to locate
11 the goods, and on the second day he executed a
12 waiver.

13 With your permission, I will read it again.

14 THE COURT: I will bet it's the same thing
15 so you don't have to read it.

16 BY MR. APPLEBY:

17 Q Now, after the goods were located, did
18 there come a time that very day when Mr. Brach was ar-
19 raigned?

20 A He was arraigned --

21 Q In the United States Courthouse?

22 A The next day.

23 THE COURT: Is that the 22nd or 23rd?

24 Q The 23rd; is that correct?

25 A Yes, the 23rd.

2 THE COURT: Was that here, of course?

3 Q U. S. Courthouse, Eastern District?

4 A Yes.

5 Q Were you present at this arraignment, agent?

6 A Yes.

7 THE COURT: I guess I was present, too.

8 MR. APPLEBY: No. This is with respect
9 to the arrest warrant of Mr. Brach.

10 THE WITNESS: I see. All right.

11 Q Where was Mr. Brach lodged the morning
12 before the arraignment?

13 A He was taken over by one of the agents
14 from our Newark office to the Hackensack jail.

15 We have facilities there to utilize.

16 THE COURT: I just think we're talking
17 about a lot of details unnecessary to this suppres-
18 sion hearing.

19 MR. APPLEDY: I think the fact that
20 Mr. Brach was lodged at the Hackensack jail would
21 have left no doubt in his mind that he wasn't
22 granted immunity at that time. He was in jail.

23 THE COURT: Where was he before?

24 MR. APPLEDY: West Street.

25 THE COURT: From what time on?

1 O'Neill - direct

40

2 MR. APPLEBY: He was at West Street April
3 21st. He was in Hackensack on April 22nd and it
4 is the Government's position that because he
5 was in jail on both days, he could not have
6 thought he was granted any kind of immunity.

7 THE COURT: Well, the matter is objective --
8 whether he had reason to believe that he was
9 granted immunity or that you made any promises to
10 him to obtain his cooperation.

11 Anything more?

12 This is a long, detailed story which, I
13 wonder whether it is necessary in a suppression
14 hearing.

15 BY MR. APPLEBY:

16 Q Did Mr. Brach make any statement to you
17 at his arraignment with respect to immunity?

18 A No.

19 Q Did he complain about the fact that he was
20 granted immunity at the arraignment?

21 A No.

22 Q Did he complain about anything?

23 A He was very upset at the high bail the
24 prosecutor asked for.

25 Q Do you recall if Mr. Lomardo represented

1 O'Neill - direct

41

2 Mr. Brach?

3 A Yes.

4 I Did he say anything with respect to the
5 fact that I hadn't lived up to the promise of immunity
6 for Mr. Brach?

7 A Yes.

8 THE COURT: Didn't I appoint Mr. Lombardo?

9 MR. APPLEBY: No. He was appointed by
10 Mr. Magistrate Schiffman and then there was a
11 question about Mr. Lombardo's representation be-
12 for you and you relieved Mr. Lombardo.

13 THE COURT: All right.

14 Do you want to cross-examine?

15 MR. YOUTT: Just a few questions.

16 THE COURT: Certainly.

17

18

19 (Continued on next page.)

20

21

22

23

24

25

2 CROSS-EXAMINATION

3 BY MR. YOUTT:

4 Q Agent O'Neill, between the time you first
5 arrested Mr. Brach at the Brooklyn Supreme Court, and
6 you took him to the World Trade Center enroute, did
7 you have any conversation with Mr. Brach?

8 A None.

9 THE COURT: You said in the car outside
10 the Supreme Court, you read him his rights.

11 Didn't you say that?

12 THE WITNESS: Yes. I didn't take that to
13 be a conversation.

14 I read his rights.

15 THE COURT: Did he say anything to you
16 after you read him his rights?

17 THE WITNESS: Yes. We did have some conver-
18 sation.

19 BY MR. YOUTT:

20 Q Would you relate that conversation?

21 THE COURT: That was in the car?

22 THE WITNESS: Yes, after I read his rights
23 to him.

24 I asked where he had been for the past couple
25 of weeks.

1 O'Neill - cross - Youtt

43

2 BY MR. YOUTT:

3 Q Did you at that point discuss the facts
4 of this case in any way with him?

5 A No way.

6 Q Did you discuss with him the nature of the
7 charges being brought against him?

8 A Only to the most minimal extent possible.

9 Q Did you discuss with him in any way the
10 subject of the cooperation?

11 A No.

12 Q Did you discuss with him in any way the
13 subject of statements he could give or information he
14 could give you in connection with this case?

15 A No.

16 Q When you arrived at the World Trade Center,
17 I believe you said you conducted a pedigree interview
18 with respect to certain vital information; is that cor-
19 rect?

20 A Yes, sir.

21 Q Prior to that time, did you engage in
22 any conversation other than the pedigree interview with
23 Mr. Brach?

24 A Not really, no.

25 Q So it was thereafter that you had the

2 discussions with Mr. Brach that you testified to earlier;
3 is that correct?

4 A Yes, sir.

5 Q In those discussion was it Mr. Brach who
6 first raised the subject of the facts of the case or
7 was it you or someone else?

8 A To the best of my recollection, after
9 being read his rights and after asking Mr. Brach if he
10 was willing to make a statement, I would think -- and
11 I am not positive -- I would think at this point I
12 explained to Mr. Brach on a more in-depth level than
13 I had earlier, the exact circumstances relevant to an
14 arrest warrant having been put out on him and explained
15 to him that he was being arrested on the issuance of an
16 arrest warrant.

17 THE COURT: Did you say anything to him
18 at this point about cooperation?

19 THE WITNESS: No.

20 THE COURT: At what point did you mention
21 about cooperation?

22 THE WITNESS: I imagine --

23 THE COURT: No, you can't imagine or sus-
24 pect this. You can't testify to that before a
25 Jury.

1 O'Neill - cross - Youtt

45

2 Do you recall? Did you make any state-
3 ment, did you make any notes as to these trans-
4 actions?

5 THE WITNESS: No, your Honor.

6 THE COURT: You have no notes and made no
7 report?

8 THE WITNESS: The main report I have
9 relative to the interview is the complaint.

10 To answer your question, sir, there were
11 no notes being taken by me in my office at
12 the initial interview.

13 THE COURT: Well, I am trying to find
14 out when is the first time you made any state-
15 ment as to cooperation -- when was that?

16 THE WITNESS: In my office I stated to
17 Mr. Drach that I felt that we had a good strong
18 case against him.

19 I explained to him the reason why he was
20 arrested; namely, for the theft of a truck on the
21 fifth and that as far as I was concerned, the case
22 was such that should he go to trial, there was
23 an excellent chance of his being convicted and
24 I wanted to know his response to that comment.

25

1
2 BY MR. YOUTT:

3 Q Did you say anything else to him about
4 the case?

5 A Yes.

6 Q Prior to his response --- what else?

7 A I stated that in the course of our in-
8 vestigation, I had been in touch with his brothers,
9 step-brothers, the Frieds or the Brachs, on quite a few
10 occasions.

11 I stated that I had had several conversa-
12 tions with his stepfather which I had both in person and
13 on the telephone.

14 Q This would be Mr. Isaac Fried?

15 A Isaac Fried.

16 Q Go ahead.

17 A I told him they telephoned me, all three
18 of the Frieds, on several occasions, which they had, and
19 recently -- I can't recall how recent, but not too far
20 prior to this date -- I had a situation with Mr. Brach's
21 stepfather on the telephone.

22 I believe he telephoned me to find out
23 the status of the investigation -- had we recovered
24 any of the merchandise, and I explained the fact that
25 Mr. Fried was very upset about this matter as were his

1 O'Neill - cross - Youtt 47

2 brothers, and that was the extent of the conversation
3 relative to the theft in question, as best I can remem-
4 ber.5 Q Did you say anything at this time with
6 regard to your interest in recovering the good which
7 were missing?8 A Mr. Brach volunteered to me at about the
9 time we were discussing the inquiries by Mr. Fried, as
10 to whether or not recovery had been made.11 I told him -- and I told Mr. Fried -- that
12 no, a recovery had not been made; at this point we
13 didn't know where the merchandise was and at approxi-
14 mately this time, Mr. Brach stated to me words to
15 the effect, "The load is intact. It's still around."

16 I took this to be an admission of sorts.

17 Q Was this the first time Mr. Brach had
18 said anything about the facts of this case in your presence?

19 A Absolutely, yes.

20 Q Prior to that time, you said something
21 about, should he go to trial, there would be an excellent
22 change of conviction.

23 Is that a fair statement?

24 A That's a fair statement based on the facts
25 as I knew them.

Q Did you say that to him or words to that
3 effect?

A Yes.

Did you elaborate on that?

6 || Page No. 1

7 Q Did you say anything to him in connection
8 with help you could give him?

A 10.

Q After he said what he said to you about
the goods still being intact, is that -- I believe you
also said he asked you to put him in touch with the
United States attorney; is that correct?

14 A I was just about to state this.

15 As I was about to ask a little bit more
16 specifically what the remark meant, he stated to me
17 that he didn't particularly at this point care to go
18 into a lot of detail with me but he would -- he did
19 express and interest in speaking with the U. S. attorney.

20 Q Did he say anything else about the case in
21 that conversation?

22 A No. 515

23 Q I take it then you called Mr. Appleby
24 and made arrangements to come over?

25 A We came over within 15 minutes.

1 Q From the time of the conversation you
2 just related, to the time you got to Mr. Appleby's
3 office, was anything said by you or by Mr. Brach or
4 anyone else in your presence concerning the facts of
5 this case?

6 A From when, sir?

7 Q From the time you spoke with Mr. Appleby
8 on the phone, until you arrived in his office?

9 A No.

10 THE COURT: On the way from the World
11 Trade Center to this U. S. Court, was anything
12 said?

13 THE WITNESS: No.

14 THE COURT: You're both in the same car?

15 THE WITNESS: All three of us.

16 THE COURT: Nothing was said?

17 THE WITNESS: Absolutely not about this.

18 THE COURT: By Mr. Brach?

19 THE WITNESS: Right.

20 BY MR. YOUTT:

21 Q When you arrived in Mr. Appleby's office,
22 he was there at that time?

23 A He was waiting for us.

24 Q That's when you and Mr. Appleby and

1
2 Mr. Brach spoke of this case and you related that
3 testimony before; is that correct?

4 A That's correct.

5 Q Who else was in the room besides you,
6 Mr. Appleby and Mr. Brach?

7 A Peter Reilly.

8 Q Now, at that time I believe you testified
9 that Mr. Brach was informed of his rights again; is
10 that correct?

11 A Yes.

12 Q Was any discussion had about his right
13 to consult counsel or the advisability of consulting
14 counsel?

15 A Absolutely.

16 Q Who said what?

17 THE COURT: It's in the card and I said
18 he didn't have to read it.

19 Q Was anything more, besides the contents
20 of that card, said or related to Mr. Brach concerning
21 his rights?

22 A I suspect, no.

23 Q Who was doing the -- well, was one person
24 among the three of you on behalf of the Government,
25 directing the inquiry at that time, or asking the questions?

2 A I would say it was a joint interview
3 between Mr. Appleby and myself.

4 Q So both you and Mr. Appleby were asking
5 questions; is that correct?

6 | A Yes.

10 A No.

11 2 Nothing at all?

12 A He broached the recovery of the goods.

13 Q You say "he." You are referring to
14 Mr. Brach?

15 A Yes, Mr. Brach.

16 Q In what way did he broach the recovery
17 of goods?

18 A Initially by the comment in my office
19 that the load was intact; that it is still around and
20 in Mr. Appleby's office, after again he had been given
21 his rights, and we began to ask him what he had to
22 say, he, I believe, took the initiative in mentioning
23 to me, Mr. Appleby and Mr. Reilly that he could find --
24 could locate the radios.

25 Q Just to get the timing of this -- there

2 came a time when he asked to see Mr. Puccio.

3 Mr. Appleby went out and came back and
4 advised him if he wanted to make a statement he would
5 have to make it to Mr. Appleby?

6 A As best I remember, yes.

7 Q Did that colloquy take place before any
8 discussion about the facts of this --

9 A Yes. I believe Mr. Appleby at the be-
10 ginning or very close to the beginning apparently con-
11 sulted with Mr. Puccio and I believe the interview
12 started from scratch after.

13 Q Did Mr. Appleby, after returning from
14 Mr. Puccio, discuss in any way what the position of
15 the Government would be with respect to Mr. Brach's
16 statement?

17 A No.

18 Q Is it your testimony that Mr. Brach just
19 began volunteering a statement?

20 Is that your testimony?

21 THE COURT: Well, did I understand you to
22 say that you conveyed to Mr. Brach the inquiries
23 that his stepfather or his brothers had made
24 with respect to the whereabouts of the load?

25 THE WITNESS: In my office -- in answer

1 to the gentleman's question -- was there any
2 conversation whatever relative to this case,
3 I answered, "Yes," and I answered that I had
4 on numerous occasions discussed the matter with
5 the Frieds concerning where the merchandise was.
6

7 THE COURT: You told that to Brach?

8 THE WITNESS: Yes, I did.

9 THE COURT: Was that the time he said
10 that the load is intact and still around, or did
11 he say that before?

12 THE WITNESS: Would you like me, your
13 Honor, to go -- I had men oned to Mr. Brach
14 that his stepfather told me something to
15 the effect that he wasn't insured entirely
16 on the load.

17 I can't remember the details.

18 THE COURT: When? I am interested in the
19 time.

20 THE WITNESS: In my office.

21 THE COURT: Well, he said the load was in-
22 tact --

23 THE WITNESS: This is before he said it
24 was intact. This was before he said that.
25

1
2 THE COURT: After you had told him that
3 his stepfather and brothers were interested in
4 where the load was --

5 THE WITNESS: Yes, they sure were --

6 THE COURT: And you told him the step-
7 father said it was uninsured --

8 THE COURT: Party uninsured.

9 THE COURT: -- then he said the load is
10 intact, still around?

11 THE WITNESS: Right.

12 THE COURT: From then on he didn't say
13 anything until you brought him back to this
14 Courthouse and Mr. Appleby came in and then the
15 discussion was he knew.

16 Is that in substance the story, without
17 going through all this and that?

18 THE WITNESS: In substance that's what hap-
19 pened.

20 BY MR. YOUTT:

21 Q I believe you testified that Mr. Brach
22 asked, "What's in it for me? Do I get immunity," or
23 words to that effect?

24 A Words to that effect.

25 THE COURT: That's before he said anything

1 to Appleby; right.

2
3 THE WITNESS: No, after we began inter-
4 viewing Mr. Brach.

5 THE COURT: But it was still before he
6 said anything to Mr. Appleby before he made state-
7 ments?

8 THE WITNESS: Absolutely.

9 THE COURT: So all you have before that
10 is, "The load's intact. It's still around."

11 Then you see Mr. Appleby and he doesn't
12 make any statements of any substance except he
13 now says, "What's in it for me"; is that right?

14 THE WITNESS: That's right.

15 THE COURT: And what else does he say?

16 He said, "What's in it for me?"

17 That's a long story just to get this --
18 oh, you told him you had a good case before he
19 said that; right?

20 THE WITNESS: Right.

21 THE COURT: And he said he wanted to make
22 a statement and Mr. Appleby is supposed to have
23 said: No, no; emphatically, no.

24 He said if he cooperated all the state-
25 ments he made would be brought to the Judge's attention.

2 That's about all; is that right?

3 THE WITNESS: That's right.

4 BY MR. YOUTT:

5 Q Was anything else said by Mr. Appleby
6 or by you or by anyone else other than Mr. Brach prior
7 to the time Mr. Brach began relating his story?

8 A No.

9 Q There was no -- that was the entire answer,
10 was it, to Mr. Brach's question, "What's in it for me"?

11 A After we settled down in Mr. Appleby's
12 office and were about to see in what direction,
13 whatever interview was going to proceed, Mr. Brach
14 said in effect, "If I cooperate and if I find for you
15 where the radios are" -- "what for" -- "what happens?"

16 THE COURT: Did he use the word "immunity"?

17 THE WITNESS: I don't recall. I think he
18 used the word "immunity."

19 I can't recall if he used it. It was
20 brought to my attention in a pre-trial conference
21 that he had said, "Could I be granted immunity?"

22 I don't remember that but it's possible
23 he could have said that.

24 THE COURT: All right.

25

1 BY MR. YOUTT:

2 Q At that point or any time during that
3 afternoon, was anything said by Mr. Appleby or anyone
4 on behalf of the Government, about the Government's
5 interest in prosecuting the recipients of the goods,
6 Mr. Mancini or his relatives?

7 A No.

8 Q Nothing at all was said by Customs agents
9 or Mr. Appleby about that area?

10 A No, not to Mr. Brach, no.

11 Q You testified, I believe, that Mr. Appleby
12 began preparing complaints against the other individ-
13 uals; is that correct?

14 A He and I, yes, began preparing the complaints.

15 Q Did you, agent, prepare an affidavit in
16 support of the complaint?

17 A Yes.

18 Q I see. And in that affidavit, did you
19 relate the information provided to you by Mr. Brach?

20 A Yes.

21 Q At that time, did you discuss with Mr. Brach
22 the necessitating of calling him as a witness or the
23 desire on the part of the Government to call him as a
24 witness should the Mancini matter materialize into a

criminal prosecution?

3 A At that time -- I would say, no, not at
4
that time.

5 Q Did the thought enter your mind at that
6 time --

7 THE COURT: I am not interested in the
8 thoughts that entered his mind.

Q Did there come a time some time on
10 April 21st, the first that Mr. Brach was in custody,
11 that you or anyone in your presence had a conversation
12 with Mr. Brach about his testifying as a witness in
13 what I'll refer to as the Mancini case?

14 *Journal of Health Politics, Policy and Law*

15  When was that?

19 Q Would that be before or after the time
20 you prepared your affidavit in the criminal case against
21 Mr. Mancini?

22 A I would say synonymous -- you mean when
23 I spoke with Mr. Brach about the feasibility of his
24 offering to testify?

25

1
2 A At that time we didn't go into any detail
3 as to what, if any, testimony would be necessary on the
4 part of Mr. Brach.

5 THE COURT: You just said you talked to
6 him about testifying in the Mancini case and now
7 you say no.

8 THE WITNESS: Maybe I got the question
9 wrong.

10 I thought I was asked when had I realized
11 that it eventually -- that this bridge would
12 have to be crossed and I realized it pretty
13 quickly.

14 BY MR. YOUTT:

15 Q My question is, when did you discuss it
16 with Mr. Brach?

17 A I would say after the preparation of the
18 complaint.

19 As best I can recall that wasn't a matter
20 in Mr. Brach's apparent mind of terrible concern then.
21 Later it did concern him.

22 Q This was while you were still in Mr. Appleby's
23 office on that first occasion?

24 A Yes.

25 Q What was said by you or anyone else on

2 behalf of the Government with respect to Mr. Brach's
3 contemplated testimony in the Mancini case on that
4 occasion?

5 A I didn't tell Mr. Brach, as best I can
6 recall, anything that he would have -- what and to what
7 extent he would have to cooperate -- this is in
8 Mr. Appleby's office.

9 Q Did you ask him if he would cooperate?

10 A Not I specifically.

11 Q Did someone in your presence ask that?

12 A That would have to be asked.

13 Q Who?

14 A Mr. Appleby.

15 Q Can you recall what Mr. Appleby said?

16 A No.

17 Q Do you have any recollection as to anything
18 Mr. Appleby said about that subject matter?

19 A I can imagine --

29 THE COURT: No. 88.

THE WITNESS: The answer is: No.

22 9 You do know it was discussed?

23 A Briefly, yes.
24 Q After you left Mr. Appleby's office ac-
25 companying Mr. Brach, did you or Agent Neilly have

1 O'Neill - cross - Youtt 61

2 any discussions with Mr. Brach about that subject,
3 the subject of his testimony in the Mancini case?

4 A About his testimony, no.

5 Q About whether or not he would be called
6 upon to testify.

7 A (No response.)

8 THE COURT: Are we waiting for something?

9 Do you want to press the question again?

10 Q Did you discuss in any way, not the
11 specifics of his testimony, but did you discuss -- and
12 by discussing, I mean whether he would be interested
13 in testifying or what testifying would entail?

14 A Yes.

15 Q What was said by whom in connection with
16 that subject?17 A By me to Mr. Brach and I asked him how
18 well he knew Mr. Mancini, Mr. Rosario, Greco, Paperwik;
19 if he were to be called upon to testify would he --
20 would this upset him; would he be worried; did he feel
21 anyone would make an attempt to harm him or do something
22 to him.23 He said that in effect, that in effect,
24 while the thought entered his mind, he wasn't very
25 worried about it but it was a possibility.

1 O'Neill - cross - Youtt

62

2 Q Did you discuss with Mr. Brach anything
3 that could be done on his behalf in connection with
4 his concern?

5 A I wouldn't discuss with him anything along
6 that line because I'm not terribly aware of just how
7 far and in what direction the Government goes.

8 THE COURT: The answer is: No?

9 THE WITNESS: No.

10 Q Did you tell him you would do anything
11 in connection with his concern?

12 A No.

13 Q Isn't it a fact, the information put into
14 the arrest warrants your department ultimately served
15 on Mr. Mancini, Greco, Rosario and others --- is it a
16 fact that information came from Mr. Brach?

17 A Yes.

18 Q Is it a fact the information that went
19 into the search warrant came from Mr. Brach?

20 A Yes.

21 Q That search warrant is the legal device
22 which was used to get into the truck and recover the
23 items that you recovered; correct?

24 A Correct.

25 Q Now, in connection with the waiver --

2 I believe it's Exhibit 2-- the first waiver that
3 Mr. Brack signed -- the waiver of a speedy arraignment --
4 do you recall exactly what he was told about the
5 significance of signing that waiver?

6 A No.

7 Q Do you recall whether -- I believe you
8 said that he originally indicated that he didn't want
9 to be speedily arraigned or something to that effect;
10 correct?

11 A yes

12 Q And he was told at some point that he
13 should sign that waiver but you do recall what he was
14 told?

15 A Yes

8. You recall seeing him sign the waiver?

17 A Yes

18 Q Do you know whether or not he chose the
19 wording of that waiver or someone else?

20 A It was more Mr. Appleby who chose the
21 wording, the specific wording.

22 Q Was the waiver read to him out loud or
23 did he read it to himself, to your recollection?

24 Both, I would say.

25 Q Did he in any way discuss the wording of

1 the waiver?

2 A No.

3 Q Is it not a fact that he was told he must
4 sign that in order to continue his assistance of Customs
5 and the Government in this particular matter?

6 A No.

7 Q Now, on the second day, there was a second
8 waiver that was signed; correct?

9 A Correct.

10 Q Would you tell me to the best of your
11 recollection what was discussed with Mr. Brach about the
12 signing of that second waiver?

13 I believe that's Exhibit 3.

14 A Yes. It was about three or 3:30 and
15 we were about an hour and a half from Eastern District.
16 It became very apparent that should we attempt to get
17 a search warrant and serve it that we weren't going to
18 come close to getting back here in time for an arraignment.

19 The management would leave, I felt,
20 6:00 o'clock at the latest. If we were to go through
21 with securing a search warrant and securing the arrest,
22 Mr. Brach wouldn't be able to be arraigned and Mr. Appleby
23 made a point of telling us throughout the day that it
24 is important to get Mr. Brach back in time for an arraign-
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ment.

When it became apparent --

Q My question was originally:

What you said to Mr. Brach?

You related what was going on in your mind.

Did you say this to Mr. Brach?

A "If we obtained a search warrant, you wouldn't be arraigned this evening," and again, "Would you waive your right to a speedy arraignment?"

Q Did Mr. Brach ask any questions about that?

A No, he was extraordinarily cooperative and said absolutely he would sign another waiver.

Q During all the time you were in the company of Mr. Brach in this search through New Jersey for the stolen goods, did you have any discussion with Mr. Brach about the subject of his cooperation in this matter, and how it might affect the case?

A No.

Q None whatsoever; is that your testimony?

A I would testify, none.

Q Did Mr. Brach ask any questions about that particular subject?

A No.

Q The next day which is now April 23rd, is that correct, the day of the arraignment?

1 A The day of the arraignment; right.

2 Q Two days after his arrest?

3 A Correct.

4 Q During that time, did Mr. Brach ask for
5 an attorney or ask to consult an attorney in your presence?

6 A No.

7 Q And he was continuously in custody during
8 that period, either your custody or the various jails
9 where you left him off?

10 A Yes. He specifically -- he was asked on
11 numerous occasions if he wanted an attorney and he
12 emphatically stated that he did not want an attorney.

13 Q At the arraignment, were you present in
14 the room -- by the arraignment, I mean the proceedings
15 before the Magistrate, the first proceedings before
16 Magistrate Schiffman, were you present in the room at
17 all times during the arraignment?

18 A Not at all times, no.

19 Q Did you physically bring Mr. Brach to the
20 location of the arraignment?

21 A No. Somebody else did.

22 Q When you arrived, was it before or after
23 the proceedings had commenced?

24 A Just before.

1 O'Neill - cross - Youtt 67

2 Q Were you present at the time bail was set?

3 A Yes.

4 Q Had anything been said prior to that time
5 by you or anyone in your presence to Mr. Brach about
6 the subject of bail?

7 A I wasn't in the building that day.

8 If I was in the building, it was on an un-
9 related matter.

10 Not by me or anyone in my presence.

11 Q Would you characterize Mr. Brach's attitude
12 and mood prior to this date?

13 I think you said extraordinarily cooperative.

14 Did that mood continue on the date of his
15 arraignment or at the time of his arraignment?

16 A After the arraignment he was annoyed.

17 Q Do you know what he was annoyed about?

18 A What he considered to be excessive bail.

19 Q As far as you were concerned, that's all
20 he was annoyed about?

21 A Yes.

22 Q Nothing else to your knowledge?

23 A No.

24 MR. YOUTT: Nothing further.

25

1 O'Neill - redirect

2 REDIRECT EXAMINATION

3 BY MR. APPLEBY:

4 Q Agent O'Neill, to your knowledge, was this
5 the first time Simon Brach was arraigned in any Court?

6 A No.

7 Q He's been arraigned on many occasions?

8 A As far as I know.

9 Q And he's had many lawyers represent him
10 during the course of his life?

11 A Yes.

12 Q When I talked to you on the phone the
13 second day you were looking for the goods, did I give
14 you any instructions as to what promises should or should
15 not be made to Mr. Brach?

16 A You were emphatic no promises should be made.

17 Q Did I tell you to make sure you told other
18 agents that?

19 A Many times.

20 MR. APPLEBY: No further questions.

21 THE COURT: The question is: Did you make
22 any promises?

23 THE WITNESS: I made no promises, no.

24 MR. YOUTT: No further questions.

25 THE COURT: Thank you very much.

1 (Witness excused.)

69

2 MR. APPLEBY: I was going to call -- I
3 was considering calling --

4 THE COURT: Yourself?

5 MR. APPLEBY: No. Mr. Lombardo.

6 I can make an offer of proof with respect
7 to what he'll testify to but he's on trial in a
8 murder trial.9 THE COURT: We're not going to extend
10 this until Mr. Lombardo gets through with his
11 trial.12 MR. APPEEBY: If it's necessary, after
13 Mr. Brach testifies, I can --

14 THE COURT: Is Mr. Brach going to testify?

15 MR. YOUTT: Yes, your Honor.

16 THE COURT: Well, maybe you can call
17 Lombardo now and bring Mr. Brach on the stand
18 and while Lombardo is coming over, we can hear
19 Mr. Brach.

20 Is that possible?

21 MR. APPLEBY: I have Judge Brownstein's
22 chambers number in my folder and perhaps your
23 clerk could call and perhaps the judge would
24 allow Mr. Lombardo to come down.

25 THE COURT: Why don't you do it?

1 MR. APPLEBY: Fine, your Honor. 70

2 THE COURT: Why don't you take care of
3 your witnesses. I will take a five-minute recess
4 so you can make a phone call.

5 (Recess taken.)

6 (After recess.)

7 MR. APPLEBY: Your Honor, I have a message
8 that Mr. Lombardo is coming right over. He's in
9 Brooklyn Supreme Court.

10 THE COURT: Do you want to hear Mr. Brach
11 or Mr. Lombardo first?

12 MR. APPLEBY: It would take a little while --

13 MS. SELTZER: Your Honor, with your per-
14 mission, may Mr. Asen take over for me? I am
15 going upstairs to Judge Judd.

16 THE COURT: That's fine.

17 MR. APPLEBY: It will take a little time
18 for Mr. Lombardo to get over here.

19 THE COURT: All right.

20 Mr. Brach, take the stand.

21
22 (Continued on next page.)

23

24

25

1 Brach - direct

71

2 S I M O N B R A C H , called as a witness,
3 having been first duly sworn by the Clerk
4 of the Court, testified as follows:

5 THE CLERK: State your name and spell
6 it for the record, please.

7 THE WITNESS: My name is Simon Brach.

8 DIRECT EXAMINATION

9 BY MR. YOUTT:

10 Q Mr. Brach, how old are you?

11 A Twenty-seven.

12 Q Did you go to school-- what schools did
13 you go to?

14 A I want to a parochial school up til 12 years.
15 I was in the States, and then for two years I went to
16 Israel -- up to 14 years I was in Brooklyn. I went two
17 years in Israel and then another year in the parochial
18 school.

19 Q You mean 14 years of age?

20 A Yes.

21 Q Did you graduate from high school?

22 A No.

23 Q Did you or did the parochial school you
24 attended, did they teach you in English or another language?

25 A We had Jewish class until 3:00 or 4:00

1 Brach - direct

73

2 o'clock and then two and a half hours of English.

3 Q The Jewish classes were taught in another
4 language other than English?

5 A **Correct.**

8 A Middle of eighth, I stopped.

9 Middle of the eighth grade.

10 Do you speak English at home?

11 A No.

Q What language do you speak?

13 A Jewish -- Yiddish.

14 THE COURT: Is this relevant?

15 MR. YOUTT: As to what Mr. Brach under-
16 stood at the time he made the statements he made.

17 The fact that Mr. Brach isn't a native-
18 tongued American --

19 THE COURT: Well, he's -- as a matter of fact,
20 he speaks and understands English very well. He
21 was here before me a couple of times.

22 MR. YOUTT: I don't think he understands
23 English as well as I do and I think his education
24 reveals that.

25

Brach - direct

BY MR. YOUTT:

Q Mr. Brach, I believe that you have heard testimony today about circumstances concerning your arrest in a case now about to begin trial; is that correct?

A Yes.

Q Were you indeed arrested on or about April 21, 1975?

A Yes.

Q Did you recognize Agent O'Neill as being one of the agents that arrested you?

A Yes.

Q Was that at the Brooklyn Supreme Court building?

A 120 Schermerhorn Street.

Q You were arrested at that time.

Q Do you recall having been advised of your rights?

A No.

Q Do you recall at any time during that day being advised of your constitutional rights?

A Later on when I was brought to downtown Manhattan.

THE COURT: World Trade building?

A 74

Brach - direct

74

THE WITNESS: World Trade building.

BY MR. YOUTT:

Q You understand what I mean by rights -- your constitutional right to remain silent, not be a witness or testify against yourself, and the right to have a lawyer present at any proceedings that may be had against you?

A Yes.

Q Are those the rights you are referring to?

THE COURT: Did you see him read from a card at any time?

THE WITNESS: When we got to the World Trade Center, he said, "We'll advise you of your rights."

In the room he pulled out the rights and I said, "It's okay. I know what you're going to read."

BY MR. YOUTT:

Q You knew that from prior experience, did you?

A Well, you know --

Q Isn't it a fact you have been convicted of a crime before, have you not?

A **Correct.**

Brach - direct

1 Q And at that time you were advised of your
2 rights also?

3 A Right.

4 Q On the basis of that experience, you
5 thought you understood your rights?

6 A Correct.

7 Q Now, at that time when you were at the
8 World Trade Center, did you have a discussion with
9 Agent O'Neill or anybody concerning the facts of the
10 case?

11 A He wanted to know very badly where the
12 goods were --

13 Q Let me interrupt you.

14 Tell me what he said in connection with
15 the question, "Where is the good?"

16 A When we were sitting in the car in
17 Brooklyn, he said, "You are arrested for stealing a
18 truck."

19 I said, "How can you arrest me? It's mine."

20 He said, "You brothers are pressing charges."

21 He showed me a warrant. He said, "Where
22 is the goods?"

23 I didn't answer that question.

24 Q Where were you when he asked you that?

A In the car where he took me to the World
Trade Center.

I didn't answer him nothing. When we went
to Manhattan, he asked, "Where's the goods?"

I said, "The goods are mine. How can you
charge me with stealing the goods?"

He said, "Your brothers pressing charges."

I said, "I have problems with my brothers.
They threw me out of the business. I have a right to
them"

He said, "Tell me where the goods are or
we're going to arrest you."

Q Talk slowly.

A He asked what I did with the goods. I
didn't answer him on the question.

At that point he said, "We could do some-
thing. Tell us where the goods are."

Q Did he say anything about what he could
do?

A At this point I said, "I don't trust you.
If you bring me in front of Puccio, maybe we can go further."

Q Do you know who Puccio is?

A He prosecuted me in my first case.

Q Do you know Mr. Puccio as an ~~assistant~~ U. S.

1 attorney?
2

3 A Correct. Then we went to Mr. Appleby and
4 they asked what I know, whether I can make recovery.
5

6 I told them, "I think I know where the
7 goods are but if I prove where the goods are, what's for
8 me?"

9 He said, "We ain't going to prosecute you."

10 Q Who said that?

11 A Mr. Appleby.

12 Q To the best of your recollection, what words
13 do you recall him using?

14 A That's one of the words he used and in
15 between -- I asked what kind of protection would I have.

16 He said, "Don't worry. We'll put you in a
17 hotel," and they put me in a jail and said, "We couldn't
18 make arrangements for the hotel."

19 Q Did you see Mr. Puccio at all?

20 A No. He said it's between us.

21 Q Tell me everything that was said with respect
22 to what would happen if you cooperated?

23 A They wanted to find out how sure I am that
24 I know where the goods are so I told them an incident
25 that happened and I was almost sure the goods were there.

Q Is that before or after anything was said

1 about cooperation?

2
3 A At this point they told me -- the understanding
4 was that if I could prove the goods were there, they
5 wouldn't prosecute me and I would testify against these
6 individuals I sold the goods to.

7 MR. APPLEBY: Would you read that back?
8 (Record read.)

9 Q Mr. Brach would you speak slowly so that we
10 can pick up every word you answer; so that Mr. Appleby
11 can hear you and the reporter can get everything down.

12 Now, was anything -- well, what was said by
13 whom about the question of you testifying against other
14 people?

15 A At this point -- you know -- first I told
16 them the substance -- how I know that most probably the
17 goods are there.

18 I told them the substance. I was down to
19 pick up money and my understanding, the goods was still
20 in the truck.

21 He told me it looks pretty good.

22 Q Who told you that?

23 A Mr. Appleby and Mr. On'Neill was in the of-
24 fice at the same time.

25 Q Do you know what he was referring to?

1
2 A Yes, that probably the goods were still
3 there.

4 Q What else was said?

5 A Now, he went down to get a warrant. He
6 wanted the names whom I sold the goods to.

7 So I gave him the names of whom I sold the
8 goods to. He went downstairs and came upstairs. He
9 said, "In order for you to show us where the goods are,
10 you have to sign me this paper."

11 Q Who said this?

12 A Mr. Appleby.

13 What else did he say about the paper?

14 A "This way you can show us where the goods
15 are and if we find it, we won't prosecute you."

16 Q Was that the first time he said, "We're not
17 going to prosecute," or was there a time before?

18 A When I said, I am almost sure where the
19 goods were."

20 Q I want you to think and remember to the
21 best of your recollection exactly what that is that
22 Mr. Appleby thought. Then I will ask you what you
23 thought that meant -- what Mr. Appleby said, I'm sorry.

24 What did Mr. Appleby say exactly?

25 A He said, "If we're going to find the goods,

1
2 we ain't going to prosecute you and you're going to
3 testify against these other individuals."

4 Q What did you understand him to mean about that?
5 Did you understand it to mean you had to
6 testify?

7 A He meant to say if you find the goods,
8 he'll put me in a hotel and I will testify in the Grand
9 Jury and all this and he'll let me go.

10 Q Now, when you signed --

11 THE COURT: Can you wait, Mr. Lombardo, for
12 a while?

13 MR. LOMBARDO: Yes, your Honor.

14 MR. YOUTT: I have no objection to interrupt-
15 ing --

16 THE COURT: No. It depends on how long
17 this is going to be. We'll wait until you finish
18 your side and then maybe we can interrupt
19 before the cross and let Mr. Lombardo get on the
20 stand.

21 Q Mr. Brach, I am handing you what has been
22 marked for identification, Government Exhibit 2.

23 Do you recognize that as having been a state-
24 ment that you signed?

25 A I signed this paper.

2 Q Do you recall who it was that prepared this
3 paper?

4 A Mr. Appleby went into his secretary's
5 office and told her to type out and he told me to
6 sign it.

7 Q Why did you sign it, what reason?

8 A This is the only way to take me out and
9 show him where the goods are.

10 Q Is that what Mr. Appleby told you?

11 A Right.

12 Q Did you read that statement before you
13 signed it?

14 A He handed it to me. I went through it fast
15 and signed it.

16 Q Did you pay attention to what it said?

17 A Not really.

18 Q Now, again, when he was talking about your
19 helping him, why were you going to help him?

20 A Because he wasn't going to prosecute me.

21 Q Was there any other reason you agreed to
22 help or assist the Government in this case?

23 A Because Mr. O'Neill, the Customs agent,
24 was so desperate to find where the goods was -- if we
25 could find where the goods were, we could put up in a

2 hotel and I told him about my child and I was frightened
3 these people would hurt me.

4 "Don't worry. You will be safe."

5 MR. APPLEBY: When was that statement
6 made?

7 THE WITNESS: In the car going out to
8 Jersey. And there was another agent present, too.
9 He put me in West Street.

10 I said, "Why," and he said he couldn't
11 make arrangements for a hotel.

12 BY MR. YOUTT:

13 Q I believe you heard Agent O'Neill testify
14 that you gave a statement as to how the goods were ob-
15 tained?

16 A Because he told me he wouldn't prosecute
17

18 Q So you made a statement concerning the cir-
19 cumstances of your getting the goods?

20 A Yes.

21 Q What reason again was it that you made that
22 statement?

23 A Because they would protect me, put me up
24 in a hotel and so on, and wouldn't prosecute me.

Q Did anyone tell you that other than Mr. Appleby?

1 Brach - direct

83

2 A Agent O'Neill, another agent with him;
3 we were driving out to Jersey. We stopped in a restaurant.
4 We went to eat -- never handcuffed me.

5 He said, "We'll put you up in a hotel."

6 I said, "I'm sorry -- can't find the place."

7 He said, "We'll try tomorrow."

8 He was going to let me go home and then
9 he called Appleby and it was my understanding that between
10 Appleby and O'Neill, they couldn't put me in a hotel,
11 couldn't let me go home.

12 So they put me in a jail.

13 THE COURT: Now, you say that Appelby
14 and O'Neill told you they wouldn't prosecute
15 you if you would tell them where to find the
16 merchandise?

17 THE WITNESS: Right.

18 BY MR. YOUTT:

19 Q You thought you were to be put up in a
20 hotel?

21 A Correct.

22 Q When did you first learn the hotel would
23 be the West Street Federal Detention Center?

24 A It was late at night and I couldn't find
25 the place I thought I would find with Agent O'Neill.

1
2 We were driving into the city. The other
3 agent with him said, "We'll drop him off home."
4

5 Q Who?

6 A The other agent with Agent O'Neill.
7

8 They were talking about dropping me off
9 home. Then I think they called up Mr. Appleby and de-
10 cided to put me into West Street.
11

12 So I asked and they said they couldn't
13 make arrangements for a hotel and said, "You can stay
14 there for the night."
15

16 Q Did they tell you why they wouldn't drop
17 you off at home?

18 A To make sure I would be here.

19 Q To have you available?

20 A Yes.

21 Q So the next day you went again?

22 A Correct.

23 Q Did there come a time when they asked you
24 again to sign a waiver form?

25 A After we found the place that I recognized
-- I memorized the house and the truck outside -- so
everything was beautiful.

26 They said, "It's too late to make it to
27 Brooklyn. Why don't you sign this?"

1 Brach - direct

85

2 Q You recognize Exhibit 3 for Identification?

3 A They wrote it up in the car and told me
4 to sign it.

5 Q Who wrote it up?

6 A Mr. O'Neill.

7 Q He said he wanted you to sign it because
8 it was too late to get back to Brooklyn?

9 A Yes.

10 Q Was anything said at that time about an
11 arraignment?

12 A No.

13 Q Did you understand what an arraignment was?

14 A If I understand what an arraignment was?

15 Q At that time?

16 A No.

17 THE COURT: Weren't you arraigned before?

18 THE WITNESS: No.

19 MR. APPLEBY: It was Brooklyn Supreme Court
20 where the agent arrested him.

21 THE COURT: No, no. In other cases.

22 Weren't you arraigned before me?

23 Q In the earlier case were you brought before
24 a magistrate to start the case going?

25 A In this case?

Brach - direct

86

Q No.

THE COURT: You know what an arraignment is?

THE WITNESS: Yes.

Q Do you understand arraignment to be before a magistrate --

THE COURT: He says he knows.

MR. YOUTT: It took me a while to learn the difference between an arraignment and an arraignment on an indictment.

I wonder if he still has the same confusion I had.

MR. APPLEBY: Objection.

THE COURT: He's talking about whether or not there was promises made for his cooperation.

What is the emphasis about the arraignment?

MR. YOUTT: What Mr. Brach knew to be a criminal prosecution and the significance of his not being arraigned.

THE COURT: Even so, he could still be arraigned, could he not, and the prosecution dropped?

MR. YOUTT: That's true.

THE COURT: I don't get the relevance of

2 || an arraignment.

3 But, of course, you see, another thing,
4 if promises were made before the arraignment,
5 which he says they were, the arraignment has no
6 significance anyway, does it?

7 MR. YOUTT: I believe the behavior before
8 the arraignment would corroborate a theory by
9 which Mr. Brach understood that he won't be --

THE COURT: I think it would be the contrary.

11 I mean, I think it is confusing. If
12 they made a promise and broke it, that's it --
13 period.

14 MR. YOUTT: Yes, but consistent with the
15 Government's theory with no promises --

16 THE COURT: That's a hundred per cent
17 right, too. You are corroborating the Government's
18 theory -- they made no such promises and that's
19 why they had to have the arraignment.

20 MR. YOUTT: If the arraignment was the
21 first day --

22 THE COURT: No. Well, anyway, you have
23 now a conflict of testimony.

24 MR. YOUTT: Yes.

25 THE COURT: Any further statements you want

1 Brach - direct

2 to ask him?

3 BY MR. YOUTT:

4 Q You signed the second waiver of arraignment,
5 Mr. Brach on the representation of the agent, that that's
6 what was necessary?

7 A Yes.

8 Q Because you couldn't get back to Court;
9 correct?

10 A Yes.

11 Q Where did you spend your second night?

12 A Hackensack, in the county jail --

13 THE COURT: Hackensack?

14 THE WITNESS: In some jail.

15 Q Did they discuss why they were taking you
16 to a jail that night?

17 A Same reason -- can't make no arrangement
18 for a hotel.

19 Q Was there a discussion about talking you
20 back to West Street?

21 A They wouldn't take me to West Street
22 because the people arrested in the same case were held
23 over night in West Street.

24 THE COURT: Didn't have the Metropolitan
25 Correctional Center available at that time. It

Was West Street?

MR. YOUTT: Yes.

Q Was there any discussion at all at that time prior to your arraignment about how your cooperation with the Government would help you?

A At that point they -- after I had this signed they waited for a warrant from New York.

They made a search warrant of the place and then some other agent decided to take me to Jersey, some other Custom agent.

Q Did anyone talk to you about testifying in the Grand Jury?

A This happened the following day when I was arraigned, the magistrate was going to release me without bail.

Mr. Appleby jumped up and said: No.

Magistrate Schiffman signed the warrants and knew what was happening downstairs. He was to let me go on my recognizance and Mr. Appleby said: No, you need bail, and asked for bail. So they set bail at \$25,000.

THE COURT: All right. What's the next question?

MR. YOUTT: I don't think he answered

2 || the last question.

3 BY MR. YOUTT:

4 Q Was there any discussion about testifying
5 in the Grand Jury at any time by anyone?

6 A I was brought a few days later to Mr. Appleby's
7 office.

8 Q At the arraignment was there any discussion.
9 about testifying before the Grand Jury?

10 A At the arraignment, he was afraid if
11 I got away without bail, I wouldn't keep to my promise.

12 I told him I kept to my promise.

13 THE COURT: We get nowhere

11 of 11 pages

16 your testimony at the arraignment?

17 THE WITNESS: No discussion about testify-
18 ing.

19 THE COURT: Next question.

20 BY MR. YOUTT:

21 Q Mr. Brach, you heard Agent O'Neill testify
22 that your attitude had changed from one of cooperation
23 to one of being hostile at the time of arraignment.

24 A Yes.

25 Q Why did that happen?

Brach - direct

1
2 A Magistrate Schiffman was going to let me
3 go without bail because he knew I was cooperating and
4 now Mr. Appleby wanted bail.

5 So I told Agent O'Neill, "What's going on
6 with you?"

7 He said, "I'm sorry." Mr. Appleby --
8 "This is the way it is. We can't do nothing.
9 It's for your own protection. You need bail for
10 your own protection."

11 So I couldn't make it and I was put to
12 jail.

13 Q Is that when you became hostile?

14 A Correct.

15 Q Did you continue to cooperate after that?

16 A Nope.

17 Q What was the reason for not cooperating?

18 A I knew I was doublecrossed.

19 THE COURT: Now, we have that.

20 Q Several days later I believe there was a
21 conference between yourself, Mr. Appleby and Mr. Lombardo?

22 A Correct.

23 Q Had Mr. Lombardo been appointed to represent
24 you as an attorney?

25 A Yes.

1 Q Where did this conversation take place?

2 A In Mr. Appleby's office.

3 Q What was said?

4 A I was brought over. Mr. Appleby wanted
5 to put me in front of the Grand Jury. I told him,
6 "I am in jail now and my deal is I am not going to be
7 prosecuted. Are you going to step up to your deal?"

8 He said, "Listen, the Judge will give you
9 a good sentence. Plead to one count."

10 I said, "The deal was that I wouldn't
11 be prosecuted for no counts."

12 I told Mr. Lombardo the promise wasn't
13 like that. So Mr. Lombardo told me --

14 Q Was this conference in the presence of
15 Mr. Appleby?

16 A Right.

17 Q What did Mr. Lombardo say?

18 A "If you don't think they'll keep their part
19 of the deal, I don't think you should testify in the
20 Grand Jury and just hold on."

21 Q Mr. Brach, have you had any conferences
22 with Mr. Appleby before or after that you have not
23 testified to here?

24 A After I told him there is no deal because

1 Brach - direct

93

2 the deal was I am not going to be prosecuted --

3 Q When was this?

4 A In his office.

5 Q Several days after arraignment?

6 A Yes.

7 Mr. Lombardo advised me, "If you think
8 you are being a fool, hold on."9 Q Is there any conference we've not covered
10 between Appleby and you?

11 A Not that I know of.

12 MR. YOUTT: No further questions.

13 THE COURT: Now, you want to wait?

14 Are you in a hurry, Mr. Lombardo, or can
15 you wait for cross-examination to take place?

16 Which do you wish?

17 MR. LOBARDO: Whatever is most convenient
18 for the Court.

19 THE COURT: How long are you going to take?

20 MR. APPLEBY: No questions on cross-examination.

21 THE COURT: You may step down, Mr. Brach.

22 Are you going to call Mr. Lombardo?

23 MR. APPLEBY: Yes, sir.

24 THE COURT: Mr. Lombardo, will you step
25 up, please.

1 Lombardo - direct

2 J O S E P H J. L O M B A R D O , called as a
3 witness, having been first duly sworn by the
4 Clerk of the Court, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. APPLEBY:

7 Q What is your profession?

8 A Attorney.

9 Q How long?

10 A Since 1939.

11 Q Did there come a time when you represented
12 Mr. Simon Brach at his arraignment on April 23, 1975,
13 in the United States Courthouse in the magistrate's
14 office?

15 A Yes.

16 Q Excuse me -- in the Courtroom.

17 A And --

18 THE COURT: That was the 22nd or 23rd?

19 MR. APPLEBY: 23rd.

20 BY MR. APPLEBY:

21 Q Do you recall myself being there?

22 A Yer.

23 Q Do you recall Agent O'Neill being there,
24 the gentleman right here with the green coat?

25 A Not really.

1 Lombardo - direct

95

2 Q And do you recall your conversations with
3 Mr. Brach at that time?

4 A Yes.

5 Q Is that the first time that you met Mr. Brach?

6 A Yes.

7 Q And do you recall my asking for \$25,000 bail?

8 A Yes.

9 Q Did you have any conversation on that
10 day with respect to Mr. Brach complaining about the
11 fact that he had been granted immunity by myself?

12 MR. YOUTT: With Mr. Brach -- I would object
13 with the attorney-client privilege.

14 MR. APPLEBY: It's been waived.

15 MR. YOUTT: We didn't waive anything.

16 This was a conference only between Mr. Appleby
17 and Mr. --

18 THE COURT: Was this conference made in
19 your presence, Mr. Appleby?

20 MR. APPLEBY: My question, your Honor, was
21 whether Mr. Brach at the time of his arraignment
complained to Mr. Brach --

22 THE COURT: You mean complained to
23 Mr. Lombardo.

24 MR. APPLEBY: Yes, I'm sorry -- about the
25 fact that I broke any promises with respect to

1
2 immunity.

3 MR. YOUTT: My objection goes to confer-
4 ences between attorney and client as such.

5 THE COURT: I understand your objection
6 perfectly.

7 Did Mr. Brach testify that Mr. Lombardo
8 was there and made certain statements to him;
9 is that right -- don't you remember that,
10 Mr. Appleby?

11 MR. APPLEBY: Yes, sir.

12 MR. YOUTT: That was a later occasion.

13 THE COURT: Didn't he tell him, "Hold on.
14 If they made a promise to you as to immunity,
15 you better hold on"?

16 MR. APPLEBY: That's what I recall.

17 THE COURT: Sure. You may ask the questions.

18 Your objection is overruled.

19 MR. YOUTT: If I may clarify one thing --
20 the questions I asked Mr. Brach were as to a
21 conference in Mr. Appleby's office several days
22 later.

23 THE COURT: The door is opened.

24 MR. YOUTT: This was in the presence of
25 Mr. Appleby.

1 Lombardo - direct

97

2 THE COURT: Now, wait a minute. He may
3 be right. Ask him that question.4 Mr. Lombardo was up in your office with
5 Mr. Brach?

6 MR. APPLEBY: Correct, your Honor.

7 THE COURT: Now, Mr. Youtt says he asked
8 Mr. Brach about what took place up there in
9 your presence; is that right?

10 MR. APPLEBY: That's correct.

11 THE COURT: All right.

12 Now, as to that, I think he opened the door.

13 I don't think he opened the door as to
14 anything else that may be open to question.

15 MR. APPLEBY: I respectfully disagree.

16 THE COURT: Let's see what he said up in
17 your office first.

18 BY MR. APPLEBY:

19 Q Did you just hear Mr. Brach testify in
20 the Courtroom, Mr. Lombardo?

21 Q Yes.

22 Q And you heard him testify with respect to
23 a conference in my office several days after the arraign-
24 ment, I believe the testimony was?

25 A That's correct.

2 Q Did Mr. Brach at that time complain to you
3 or to me about the fact that I had broken a promise
4 of immunity to Mr. Brach?

5 I don't recollect that.

6 Q Mr. Lombardo, is this the kind of question
7 that you would remember, if it had come up?

8 A Yes

9 THE COURT: You don't remember him protest-
10 ing that the Government broke their promise of
11 immunity?

12 THE WITNESS: No, your Honor.

13 THE COURT: All right.

14 MR. APPLEYARD: Now, I'd like to direct

15 Mr. Lombardo's attention to the arraignment itself.

16 BY MR. APPLEY:

17 Q You heard Mr. Brach make a statement that
18 Magistrate Schiffman was aware of a promise of immunity
19 granted by myself, by the Government?

29 A Yes.

21 Q In other words, that must have been stated
22 in open Court for Magistrate Schiffman to be aware of
23 that: isn't that correct?

24 A I would think so.

Q Was it ever brought to Magistrate Schiffman's

2 attention that the Government, myself or anyone in the
3 Government, had granted Mr. Brach immunity with respect
4 to the case he was arraigned on?

5 A No.

6 THE COURT: Not in your presence anyway?

7 THE WITNESS: No, your Honor.

8 MR. APPLEBY: No further questions.

9 MR. YOUTT: I have no questions.

10 MR. APPLEBY: If you wish, I can call
11 Peter Reilly.

12 THE COURT: No. I would prefer you get on
13 the stand and make a statement as to whether or
14 not you made any such promise.

15 MR. APPLEBY: I can take an oath.

16 THE COURT: No, you understand you are
17 under oath. But you had better make a statement.

18 I ask you to take the stand in case Mr. Youtt
19 wants to cross-examine you.

21 (Continued on next page.)

22

23

24

25

2 RICHARD APPLEY, called as a
3 witness, took the stand and testified as follows.
4 under oath:

5 THE COURT: You consider yourself under
6 oath to tell the truth, the whole truth and
7 nothing but the truth?

8 THE WITNESS: I do.

9 THE COURT: You heard the testimony of
10 Mr. Brach with respect to his conference with you
11 when brought to your offices by Mr. O'Neill and
12 he says you promised him immunity from prosecu-
13 tion and he would cooperate with you and show
14 you where the load was.

15 Did you make any promise to him of immunity?

16 THE WITNESS: No, your Honor, I definitely
17 did not.

18 As a matter of fact, I was a neophyte assist-
19 ant at that time. It would have been completely
20 ridiculous for me as a lowly assistant to say,
21 "Mr. Brach, you have immunity."

22 THE COURT: Did he ask for immunity?

23 THE WITNESS: He did ask for immunity.

24 THE COURT: Did you go to anyone to find out
25 if you could give him immunity?

1 Appleby

A 101₁₀₁

2 THE WITNESS: No. He said he wanted to
3 talk to Mr. Puccio and I thought if I brought
4 Mr. Puccio into the conference, he would be more
5 cooperative.

6 Mr. Puccio said, "This is your case.
7 You talk to Mr. Brach."

8 In effect, he said, "I'm staying out of
9 this case."

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12 fols.

13 (Continued on next page.)

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2 THE COURT: Did you ask him whether you should
3 grant him immunity?

4 THE WITNESS: No.

5 THE COURT: Did you grant him immunity of any
6 kind?

7 THE WITNESS: No.

8 THE COURT: Did you promise him any assistance
9 of any kind if he cooperated?

10 THE WITNESS: I told him any cooperation he
11 gave to the Government, would be made known to the
12 sentencing Judge at the time of sentence. I wasn't
13 about to enter any deals on how many counts he was
14 to plead to.

15 THE COURT: Did you tell him if he testified
16 you would grant him immunity?

17 THE WITNESS: No.

18 THE COURT: Did you discuss with him the
19 problem of testifying against the Mancinis in their
20 trial?

21 THE WITNESS: Yes, I believe I did. I told him
22 there would probably be a case against Mancini and
23 these other individuals where he would have to be a
24 witness and he would eventually have to testify
25 before the Grand Jury.

1
2 THE COURT: He never testified before the
3 Grand Jury, did he?

4
5 THE WITNESS: No. At the arraignment I asked
6 for high bail because I wanted Mr. Brach to testify
7 before the Grand Jury before we were considering to
8 lower the bail. He was mad about the fact I asked
9 for high bail because ^{but} he was a fugitive for a long
10 while and I wanted to have him locked into his
11 testimony and wasn't going to consider the question
12 of lowering his bail until I was sure he was going
13 all the way with the Government.

14 THE COURT: Did you tell him you were going
15 to get him hotel accommodations?

16 THE WITNESS: No.

17 THE COURT: Do you want any questions?

18 MR. YOUTT: I have no questions, your Honor.

19 THE COURT: Thank you very much.

20 Gentlemen, this is simply a case of credibility.
21 Whether I am going to believe Mr. Brach or whether
22 I am going to believe Mr. O'Neill and Mr. Appleby
23 and Mr. Lombardo and frankly, I am going to believe
24 Mr. Appleby, Mr. O'Neill and Mr. Lombardo.

25 Consequently, I find there has been no problems
of immunity in order to obtain Mr. Brach's cooperation

1
2 and I am going, naturally, to dismiss the motion to
3 suppress and permit any such statements made by
4 Brach in this connection, admitted into evidence.

5 MS. SELTZER: I move pursuant to Rule 14 of the
6 Federal Rules for severance of my client in view of
7 that ruling. I don't see how it is possible to
8 redact portions of that statement so as not to
9 prejudice my client.

10 THE COURT: I don't know about that. I would
11 have to wait and see what Mr. Appleby's suggestions
12 would be as to how it could be redacted. Mr. Brach
13 is going to testify.

14 MR. YOUTT: He is not going to testify.

15 THE COURT: I mean he is not going to testify.
16 Then the testimony would only be by Mr. O'Neill as
17 to the statements made by Mr. Brach.

18 MR. APPLEBY: Correct.

19 THE COURT: So, I would have to see what they
20 are going to excise. I can't sit here and say
21 under any circumstances could proper --

22 MR. YOUTT: I would like to join in the motion,
23 if a redaction is made to satisfy Mrs. Seltzer, I
24 believe it is going to severely hamper my opportunity
25 to cross-examine the agent concerning the matter of

2 the statement.

3 THE COURT: I can't see that. I have to see
4 the redaction. Under your theory there wouldn't be
5 any possibility to have any redaction.

6 MR. YOUTT: If I cross-examine the agent on
7 the case report --

8 THE COURT: I haven't seen it and I have got
9 to see what the redaction is going to be.

10 MR. YOUTT: Perhaps we can have a hearing on
11 that?

12 THE COURT: I won't have any hearing on this
13 little case.

14 MS. SELTZER: At what point will it be
15 determined?

16 THE COURT: I suppose you can do this, you
17 can work with Mr. Appleby and Mr. O'Neill and see
18 what their redaction is going to be and then I think
19 that could be submitted to me at a status report.
20 We are not going to pick any jury tonight.

21 MR. YOUTZ: If we are in a position where a
22 redacted statement comes out that Mr. Brach was the
23 only person --

24 THE COURT: It can't be so.

25 MR. YOUTT: It would have to be, it wouldn't

1 take anything much to figure out who it is.

2 MR. APPLEBY: I have gone over this with
3 Agent O'Neill and we have worked out a manner that
4 would be acceptable. The oral statement has been
5 reduced to a written statement. I can simply make
6 a copy of that, cross out the parts in a felt pen so
7 you can see beneath it to indicate what Agent O'Neill
8 would not testify to.

9 MR. YOUTT: On cross-examination I wouldn't
10 be limited on that --

11 THE COURT: You will be limited on cross-
12 examination as to what the agent said on direct
13 examination.

14 MR. YOUTT: Rule 106 provides if a statement
15 is introduced into evidence or utilized, any other
16 party may utilize any part of that statement made in
17 the case.

18 THE COURT: I understand if there is going to
19 be any statement made as to Mr. Bikel -- you better
20 give it to me immediately. Give me the redacted
21 statement, we will have a hearing tomorrow morning.
22 Then we will pick the jury later. 10:00 o'clock
23 tomorrow morning.

24 ***
25

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Gerald O'Neill	5	42	68	
Simon Brach	71			
Joseph J. Lombardo	94			
Richard Appleby	100			

E X H I B I T S

<u>GOVERNMENT'S</u>	<u>DESCRIPTION</u>	<u>FOR ID.</u>	<u>IN EV.</u>
1	Advice of Rights	9	9
2	Document	30	
3	Document	37	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
SIMON BRACH, :
Plaintiff-Petitioner, :
-against- : 75-C-1069
UNITED STATES OF AMERICA, :
Defendant. :
-----x

Appearances:

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Of Counsel

BARTELS, District Judge

Petitioner Simon Brach moves, pursuant to 28 U.S.C. §2255, for an order vacating his sentence and judgment of conviction imposed by this Court on March 3, 1972, for unlawful possession and sale of "Unisonic" AM-FM stereos moving as part of or constituting a foreign shipment of freight in violation of 18 U.S.C. §§2, 659, and 2315, and incidental thereto, seeks discovery and an evidentiary hearing. Brach was sentenced to three years imprisonment on the possession count and four years probation on the sale count. On the same date a similar sentence and judgment of conviction was imposed on his mother, Zali Fried, who was sentenced to three years imprisonment on the possession count and two years probation on the sale count. On appeal the conviction was affirmed. United States v. Fried and Brach, 464 F.2d 983 (2d Cir.), cert. denied, 409 U.S. 1059 (1972). Subsequently, Brach was released on parole on September 20, 1973. Since that time he has, according to the petition and affidavit in opposition, been charged with a new one count indictment for theft from a foreign shipment.

On October 24, 1972, and again on July 10, 1974, Zali Fried moved for a new trial pursuant to Rule 33 of the

Federal Rules of Criminal Procedure, 18 U.S.C. Brach did not join in either motion. This Court denied the first motion of October 24, 1972, following a hearing (United States v. Fried, 359 F.Supp. 227 (E.D.N.Y. 1973)), but on October 12, 1973, the Court of Appeals reversed this order to the extent that this Court denied the motion on count 3, the "sale" count, on the ground of prosecutorial negligent non-disclosure of material information concerning witness Joseph Levy's testimony, and in all other respects affirmed the order and Zali Fried was thereafter required to serve her sentence. United States v. Fried, 486 F.2d 201 (2d Cir. 1973), cert. denied, 416 U.S. 983 (1974) ("Fried II"). The second motion of July 10, 1974, was denied by this Court on August 9, 1974, in an opinion dictated from the bench, from which Zali Fried took no appeal.

Brach's application at pages 2, 3 and 4 is based upon the same facts listed in Zali Fried's first new trial motion in 1972. After a hearing of this 1972 motion, at which Assistant United States Attorney Thomas Puccio testified, the Court denied the motion and also any further discovery. The Court of Appeals in its partial reversal had before it all the facts which petitioner now alleges in his

present petition and in rendering its opinion stated among other things: "[t]here is no showing that evidence regarding seizure of some of the stolen stereos in the possession of so-called 'legitimate' purchasers could not have been uncovered with due diligence prior to trial." Fried II, supra, at 203. At the present time petitioner wishes to relitigate that very issue.

I. Facts

Petitioner alleges two grounds for his application:

(1) the ruling of the Court of Appeals in Fried II reversing Fried's conviction for sale of the stolen Unisonics, and

(2) the allegedly newly discovered evidence introduced on behalf of Zali Fried at the second new trial motion which was not appealed. After reading and considering the petitioner's briefs and cases cited therein, we conclude that this motion must be denied in all respects.

As to the first ground, petitioner claims there is a difference between his case and the Fried case, in that there was no other evidence against him for both possession and sale independent of Levy's testimony, which the Court of

Appeals felt was tainted as far as Fried's conviction on the sale count was concerned. This is simply not the fact because there is other evidence against Brach on both counts. Levy's testimony as to Brach was corroborated as to both the sale and possession counts by the testimony of other witnesses. Fred Mele, a New York City policeman, testified that he knew Mr. and Mrs. Fried and Simon Brach and had worked for Brach as a truckdriver and previously delivered electronics, radios, phonographs and tape-recorders for him; that on November 3, 1970, at about 8:15 A.M., Brach came to him at the 90th Precinct in Williamsburg, Brooklyn and told him that he had some merchandise "a customer is waiting for," which was already on his truck and which he wished Mele to deliver. He testified that Brach said that he (Brach) would meet him at the place of delivery and then Mele would be "finished." Continuing, Mele stated that at the time of the request Brach had parked his truck across the street from Mele's precinct, which incidentally was in the same neighborhood as Fried Trading Company, the Fried family business. Mele testified that thereafter Mele drove the truck from the precinct to Orchard Street in Manhattan, where Mele delivered the contents to Joseph Levy. Mele

further stated that Brach was at Orchard Street in his own car at Levy's place when Mele arrived with the truck, and that Brach waved Mele and the truck over to the opposite side of the street where Levy came to the truck and Mele and Levy without Brach's help unloaded the merchandise, consisting of 50 cartons, for which Brach said he would get the receipt from Levy. Mele identified the cartons as approximately the same size as cartons introduced into evidence containing the stolen Unisonic stereos, though he could not identify them as the cartons he delivered. In addition, Patrolman Douglas LeVein testified that on November 4 and 5, 1970, he had seized from 130 Orchard Street, Levy's place of business, 82 Unisonics falling within the known range of stolen Unisonics, and special waterfront agent William Stockey testified that on November 4, 1970 he also seized 90 to 100 cartons of stolen Unisonics from Levy's warehouse at 130 Orchard Street.

The testimony of these three witnesses was sufficient circumstantial evidence to support Brach's conviction on both counts independently of Levy's testimony and, in addition, it corroborated Levy's testimony as to Brach and linked Brach as an aider and abettor to his mother's possession of stolen goods. It should be noted that Brach was charged not only with actual possession but also with aiding and abetting

such knowing possession by his mother, Zali Fried. The Court instructed the jury that all defendants were charged with aiding and abetting the possession as well as the sale of stolen stereos, knowing the same to be stolen.

The other ground for the §2255 application is the so-called new evidence disclosed on behalf of Zali Fried in her second trial motion of July, 1974, which was denied and from which decision she did not appeal. The charge is that there was confusion of serial numbers and carton numbers and a mix-up in the two shipments of the stereos which was exculpatory in nature, of which the Government had knowledge but failed to reveal the same to the defendants. In denying Zali Fried's second new trial motion, the Court found there was no basis for Zali Fried's allegations and that there was no prosecutorial misconduct involved; nor has the petitioner Brach shown in this application that there was such confusion in stereo and carton numbers involving exculpatory facts of which the Government had knowledge but failed to turn over to the defendants. As stated in the Government's affidavit in opposition at page 2, this Court in denying Zali Fried's motion found that, except for the consignee's list, the

Government had no knowledge of the items involved and that the items were insufficient to require a new trial, and further, that while the list was in the possession of the Government, it was not evidence that could "be considered exculpatory." (Hearing Transcript at p. 29.)

II. Law

This is the fourth attempt of a member of the Fried family to circumvent the verdict of the jury convicting Zali Fried and her son, Simon Brach, as affirmed by the Court of Appeals in 464 F.2d 983 (2d Cir.), cert. denied, 409 U.S. 1059 (1972). Referring to petitioner's first ground for his application, it is vital to note that he never joined his mother in the first application for a new trial nor in the appeal to the Court of Appeals decided in 1974, nor in her second new trial motion in 1974. At this late date, having now been indicted again on another charge, he attempts to use 28 U.S.C. §2255 as a substitute remedy for Rule 33, F.R.Crim.P., from which he is now time barred by the two-year jurisdictional limitation. Section 2255 states that an application for relief may be made by a prisoner in custody who claims that he has a right to be released on the

grounds that sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction or that the sentence was in excess of the maximum or otherwise subject to collateral attack. We realize that such an attack is available even though no direct appeal was available to him or had been taken from the denials of the two motions for new trial, and that the petitioner, as indicated in the petition, must be considered "in custody" pursuant to the requirement of § 2255.

In the decision denying Zali Fried's second new trial motion, this Court found that there was no prosecutorial misconduct, as more particularly described in the opinion rendered off the bench, see Hearing Transcript at pp. 28-31, and hence no violation of the Constitution or laws of the United States. See United States v. Keogh, 391 F.2d 138, 146-48 (2d Cir. 1968). Even without the testimony and circumstantial evidence supporting Brach's conviction on both counts, there is no basis in law for Brach at this late date to apply the Court of Appeals partial reversal in Fried II to Brach's circumstances. Both Brach and his mother had their day in court where full and fair consideration was given to Brach's constitutional claims, and he cannot now

✓ seek relief where he has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal. See Kaufman v. United States, 394 U.S. 217, 227, n.8 (1969). In Townsend v. Sain, 372 U.S. 293, 317 (1963), the Supreme Court stated that "[t]he standard of inexcusable default set down in Fay v. Noia [372 U.S. 391 (1963)] adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

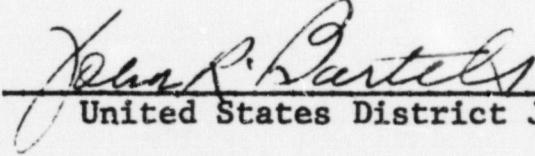
As to petitioner's second ground for the application, he attempts to avoid the time bar of Rule 33 by alleging that the Fried II case was an intervening change in law analogous to Davis v. United States, 417 U.S. 333 (1974), permitting a claim under §2255. In Davis the petitioner had been convicted for failure to report for induction but after such conviction the Supreme Court in the case of Gutknecht v. United States, 396 U.S. 295 (1970), held on virtually identical facts that Gutknecht's conviction was invalid. Therefore, upon Davis' §2255 application the Supreme Court held that his induction was invalid by reason of an intervening

change in law in Gutknecht. The factual context of the Fried case can in no manner be analogized to Davis because in Fried II there was no change, intervening or otherwise, in the law; there was simply the application by the Court of Appeals of a familiar principle of law reaching a result different from that reached by the application of the same law by the lower court. See United States v. Loschiavo, Docket No. 75-1310, at 2228-40 (2d Cir., filed Mar. 3, 1976).

Having considered Brach's claims in Zali Fried's second new trial motion and finding no basis in law or fact for an evidentiary hearing and no newly discovered evidence, the Court for the reasons heretofore stated denies Brach's petition in all respects. ^{1/}

SO ORDERED.

Dated: Brooklyn, N.Y.,
March 9, 1976.



United States District Judge

1/ We find United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975), cited by petitioner, inapposite.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 15th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a GOVERNMENT'S APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Harry E. Youtt, Esq.

919 Third Avenue

New York, N. Y. 10022

Sworn to before me this
15th day of March, 1976

Evelyn Cohen

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4601966
Qualified in Kings County
Commission Expires March 30, 1977